

No. 12484

United States
Court of Appeals
for the Ninth Circuit.

AMERICAN AUTOMOBILE INSURANCE
COMPANY and AMERICAN AUTOMO-
BILE FIRE INSURANCE COMPANY,

Appellants.

vs.

AMERICAN AUTO CLUB,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

MAY 8 1950

PAUL P. DUNN

No. 12484

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern District of California, Central Division.

No. 8032-B

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

AMERICAN AUTO CLUB, a corporation, JOHN DOE ONE TO TEN, JANE DOE ONE TO TEN AND DOE CORPORATION ONE TO TEN,

Defendants.

AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF

Come Now the plaintiffs and complaining of defendants, and each of them, allege:

I.

That at all times herein mentioned plaintiffs have been and now are corporations duly incorporated, organized and existing under the laws of the State of Missouri and authorized to do business in the State of California; that the defendant, doing business under the name and style of American Auto Club, is a corporation incorporated under the laws of the State of California and a citizen and resident of the State of California.

II.

That this is a suit between citizens of different states [2*] and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3000.00.

III.

Defendants John Doe I, Jane Doe I and Doe Corporation are sued herein under fictitious names, their true names being unknown to plaintiffs, and when said true names are discovered plaintiffs will ask permission of the court to amend their complaint by inserting them herein; that plaintiffs are informed and believe and therefore allege that said defendants are in some way responsible for the conduct of the business of the defendant corporation.

IV.

That defendant American Auto Club was incorporated and organized under the laws of the State of California on March 6, 1947; that the name of said corporation was changed to American Auto Club on July 8, 1947, by a certificate of amendment filed by the incorporators thereof; that since said time defendants have been doing business in the State of California under said style and name.

V.

That plaintiffs were organized in the State of Missouri in the year 1911 for the purpose of engaging in and conducting the business of automobile insurance and in 1927 they further organized for

* Page numbering appearing at bottom of page of original Transcript of Record.

the purpose of conducting a fire insurance business, and for more than thirty-seven years the plaintiffs have been so engaged in operating and conducting automobile insurance or fire insurance businesses, employing a large number of salesmen and representatives and soliciting and selling said insurance to the public in the State of California and throughout the United States and in foreign countries.

VI.

That in conducting said insurance businesses for the said period of thirty-seven years plaintiffs have expended and invested large sums of money for the improvement and enlargement of their [3] companies and for the betterment of their services and good will to their clients and the purchasing public; that as a result of said expenditures and effort on the part of plaintiffs' companies they have acquired and earned a large volume of insurance business as well as a valuable reputation and regard among clients, brokers and trade journals for a high quality of service, financial responsibility and fair dealing; and that as a direct result of the aforesaid services and reputation, plaintiffs' business and good will are worth several millions of dollars, the exact amount of which is not presently ascertainable.

VII.

Soon after the organization of the plaintiff corporations, their clients, persons engaged in the insurance business, and the buying public, as well as

trade journals, newspapers and magazines of general circulation, shortened the name of the plaintiffs to "American Auto" so that by reason of the character and quality of services rendered plaintiffs have become widely, commonly and publicly known and accepted in the State of California and throughout the United States as "American Auto"; that the name "American Auto" is and has been invariably used by the plaintiffs' salesmen as indicating the concern with which the public was dealing and persons engaged in the insurance business generally have accepted and known plaintiffs by that name.

IX.

That plaintiffs learned for the first time of the existence of the defendant corporation on or about September 10, 1947, and of the fact that they proposed to enter the automobile insurance business and to sell, under the names of American Auto Club and "American Auto," various types of automobile insurance policies of the variety and type sold by plaintiffs, and that they now contemplate further expansion of said automobile insurance business, all in disregard of the rights of plaintiffs; that promptly thereafter, [4] on September 15, 1947, plaintiffs, through their attorneys of record herein, mailed to said defendant a letter in which the plaintiffs protested the use of said name in conducting said insurance business and requested that defendants discontinue the use of said name. No reply to said letter was ever received and in spite

of the protest, so made as aforesaid, defendants have used, are using and, unless restrained by order of this court, will continue to use said name in conducting their insurance business, to the injury and damage of plaintiffs; that plaintiffs have appealed to the Commissioner of Corporations and to the Insurance Commissioner of the State of California but have been advised that they no longer have jurisdiction or discretion in the matter of approving or denying the use of said name by defendants.

X.

That the defendants, if not restrained by order of this court, will inevitably become known as "American Auto" and they will permit and allow their salesmen and representatives to go out among the public and particularly the large number of plaintiffs' customers, representing that they are employed by the "American Auto" and soliciting business for the defendant with words, actions and conduct calculated to deceive said public and said plaintiffs' customers into believing that they are dealing with plaintiffs' companies; that the inevitable result has been and will be that the defendant and its representatives, in using the name "American Auto" in the conduct of said competitive insurance business will create a confusion in the minds of the public and plaintiffs' customers and result in a diversion of sales and good will from plaintiffs; that the valuable patronage which is an increment of plaintiffs' reputation will be lost and further-

more, if the services rendered by said defendant do not measure up to the standard which persons in the insurance business and the general public have come to expect of the plaintiffs, this fact will lower the reputation, standing [5] and prestige of the plaintiffs, all to their irreparable loss, injury and damage.

XI.

That plaintiffs have no speedy nor adequate remedy at law and the extent of the damage they will suffer in their sales, good will and reputation cannot be adequately or at all compensated in damages.

Wherefore, plaintiffs pray judgment that:

1. Defendants, and each of them, and all of their agents, servants and employees be restrained from including or using in any name under which they, or any of them, might do business or in any advertising or publicizing which they or any of them do or cause to be done or hereafter do or cause to be done in connection with their said business or any part thereof, the words "American Auto" or any colorable imitation thereof or any group or combination of words in effect the same as or colorably similar to "American Auto" and from using the name "The American Auto Club" or any colorable imitation thereof in connection with their said business.

2. Defendants and each of them and all of their agents, servants and employees be restrained from selling or soliciting insurance policies, and from in any way participating in the insurance business under or in connection with the name "American Auto Club" or any name including the words "American Auto" or any colorable imitation thereof.

3. An order be issued requiring the defendants to appear at a time and place to be fixed by this court requiring defendants to attend and show cause why a temporary injunction should not issue restraining them in accordance with sub-division I of this prayer. [6]

4. A temporary injunction be issued pending the trial of this action and that a permanent injunction be issued restraining defendants in accordance with sub-divisions 1 and 2 of this prayer.

5. Plaintiff have its costs incurred herein.

6. Such other and further relief be awarded as may be meet and proper in the premises.

PARKE, STANBURY &
REESE,

By /s/ RAYMOND G. STANBURY,
Attorneys for Plaintiffs.

State of California,
County of Los Angeles—ss.

Don R. Sessions being first duly sworn, deposes

and says: that he is the Vice-President for American Automobile Insurance Company, a corporation and as such makes this affidavit for and on behalf of said corporation, plaintiff in the above entitled action; that he has read the foregoing Amended complaint for Injunctive Relief and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Subscribed and sworn to before me this 1st day of December, 1948.

/s/ DON R. SESSIONS.

[Seal] /s/ MARY O. TERPENNING,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed December 15, 1948. [8]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Defendant American Auto Club, a corporation, answering plaintiffs' amended complaint on file herein, admits, denies and alleges:

I.

This court is without jurisdiction of the subject matter of said amended complaint.

II.

Plaintiffs' amended complaint fails to state a claim upon which relief can be granted.

III.

Answering paragraph I of plaintiffs' amended complaint, defendant American Auto Club states that it has no information or belief on the subject of any allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

IV.

Answering paragraph II, this defendant denies that there is any amount in controversy herein or that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00.

Further answering said paragraph II, this defendant states that it has no information or belief upon the subject of the remaining allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

V.

Answering paragraph III, this defendant states that it has no information or belief upon the subject of the allegations [10] thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground denies generally and spe-

cifically each and every, all and singular, said allegations.

VI.

Answering paragraph V, this defendant states that it has no information or belief upon the subject of the allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

VII.

Answering paragraph VI, this defendant states that it has no information or belief upon the subject of the allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

VIII.

Answering paragraph VII, this defendant states that it has no information or belief upon the subject of the allegations thereof sufficient to enable it to answer said allegations, and placing its denial upon that ground, denies generally and specifically each and every, all and singular, said allegations.

IX.

Answering paragraph IX, this defendant admits that on or about September 15, 1947, plaintiffs mailed defendant the letter therein referred to, to which defendant made no reply.

information or belief, and as to those matters he believes it to be true.

/s/ WALTER MULLER.

Subscribed and sworn to before me this 6th day of December, 1948:

[Seal] /s/ PAULINE GREEN,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 3, 1952.

Receipt of copy attached.

[Endorsed]: Filed December 22, 1948. [13]

[Title of District Court and Cause.]

PLAINTIFFS' EXCEPTIONS TO
PROPOSED (LOCAL RULE 7(a))

Plaintiffs respectfully submit the following objections to the proposed findings of fact.

I.

Add to the end of paragraph IV, at page 3, line 3:

“and to that section of the public holding policies with plaintiffs or with whom plaintiffs have adjusted claims.”

II.

Plaintiffs object to that portion of paragraph VI commencing with the word “Since” and ending

with the word "Auto," page 4, lines 1 to 3 because the evidence shows without dispute that plaintiffs have not abandoned the name "American Auto" and that, among other things they are listed as such or as "American Automobile" in telephone directories throughout the United States. [15]

III.

Add to paragraph VII page 4, line 9, following the word "companies" the following:

"This is a temporary condition; plaintiffs still write automobile insurance extensively but because, at the present time, it is not profitable plaintiffs have made no effort to expand that branch of their business."

IV.

Object to paragraph VIII page 4, for the reason that it is self-evident that the words "American Auto" are unique and because the evidence shows that they apply to no insurance company or concern other than these plaintiffs.

V.

Object to paragraph IX, page 4, that portion thereof commencing with the word "Neither" at line 14 and ending with the word "clientele" at line 18, for the reason that it is self-evident that plaintiffs sell to the public, although through agents and brokers, as members of the public comprise

plaintiffs' clientele. Plaintiffs propose the following in lieu thereof:

“Plaintiffs solicit automobile insurance business from, and sell the same to members of the public, through independent insurance brokers and agents who, in the main, have their own clientele.”

VI.

Add to paragraph X, following the word “name” at page 5, line 6, the following:

“Plaintiffs, at all material times, have had outstanding from their Los Angeles office some forty thousand to fifty thousand [16] policies of insurance; plaintiffs, in the course of their business, have occasion to settle claims with large numbers of persons, said number having been approximately twenty-four thousand persons in the year 1947; that plaintiffs are commonly known to such persons, dealing with plaintiffs as claimants or policy holders, as “American Auto” or “American Automobile.”

The reason for this objection and proposed amendment is that it is obvious that plaintiffs' dealings are not confined to brokers and agents. The undisputed facts prove that plaintiffs deal with and are known to many thousands of persons who are not brokers or agents and with whom their reputation and name has significance and value.

VII.

Plaintiffs object to the whole of paragraph XI, page 5, for the reason that the statement that plaintiffs are not known to the public as "American Auto" is untrue, the undisputed evidence being that no insurance concern other than these plaintiffs is known as "American Auto" and it being undisputed that a large segment of the public, if assumed to be composed of no others than claimants and policy holders, so know these plaintiffs. Further the statement that the name "American Auto" has not acquired a secondary meaning is untrue, according to all the evidence. Plaintiffs request that the following be substituted in lieu thereof:

"Plaintiffs and each of them is known to a large segment of the public, including many thousands of policy holders and claimants, as "American Auto"; that no other concern dealing in any way with insurance [17] or automobile service in the United States is, or has at any material time, been known as "American Auto" or "American Automobile"; that said words "American Auto" have thereby acquired a secondary meaning referring to plaintiffs."

VIII.

Plaintiffs object to the whole of paragraph XV, pp. 5 to 6 in that said finding, in declaring that defendant will not engage in the business of selling insurance, is untrue; the undisputed evidence is that the defendant is authorized by its Articles of In-

corporation to sell insurance; that it has introduced into evidence a circular informing its proposed members that it will provide assistance in obtaining insurance; that its President testified that the said defendant will aid its members by referring them to insurance brokers and agents; that the organizers and proprietors of the defendant are now insurance brokers; plaintiffs propose the following in lieu thereof:

“Defendant is authorized by its Articles of Incorporation to sell automobile insurance; that defendant proposes to assist its members by referring them to insurance agents and brokers for the purpose of having automobile insurance written for such members.”

IX.

Plaintiffs request that the following finding be added:

“That the defendant has not thus far commenced to operate; that it has no members, no office and no organization; that it has withheld the commencement of its operations until after the determination of this [18] litigation.”

X.

Plaintiffs request that the following finding also be added:

“that defendant intends to provide its members with emblems prominently displaying the words “American Auto Club,” to be carried

on their automobiles; that the effect of such emblems upon persons who know plaintiffs as "American Auto" may cause such persons to believe that there is an identity or association of proprietorship between plaintiffs and defendant."

CONCLUSION

The foregoing objections are not intended to constitute an acquiescence by plaintiffs in those findings which are not objected to. Plaintiffs intend to move for a new trial and if the same is denied to appeal from the judgment. Since the Court has found in favor of the defendant it has been assumed, in presenting these objections, that basic findings in favor of the defendant will be made and therefore the same have not been expressly objected to above. Most of the foregoing objections do not conflict with the basic findings of the Court but do, we respectfully submit, comply with undisputed evidence.

Insofar as any of the foregoing objections are allowed, counsel for plaintiffs are willing to cause the findings to be retyped as finally approved.

Respectfully submitted,

PARKER, STANBURY &
REESE,

By /s/ RAYMOND G. STANBURY,
Attorneys for plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 27, 1949. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause was submitted upon the pleadings, evidence, exhibits and arguments of counsel for plaintiffs and of counsel for defendant, and, after due consideration, the Court, being fully advised in the premises, enters its findings of fact and conclusions of law, as follows:

Findings of Fact

I.

Plaintiffs at all times herein mentioned have been and now are corporations duly incorporated, organized and existing under the laws of the State of Missouri and each is authorized to do business in the State of California.

Defendant, American Auto Club, is a corporation duly [21] incorporated, organized and existing under the laws of the State of California, and is a citizen and resident of the State of California.

II.

This is a suit between citizens of different states and the amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00.

III.

Defendant was incorporated and organized under the laws of the State of California on March 6,

1947, under the name "Auto Club of Hollywood." The name of said corporation was changed to "American Auto Club" on July 8, 1947, by a certificate of amendment duly filed by its incorporators. Since said time, defendant has been licensed and qualified to transact the business of a motor club in the State of California under said style and name.

IV.

Plaintiff, American Automobile Insurance Company, was organized in the State of Missouri in the year 1911 for the purpose of engaging in and conducting the business of automobile insurance. In 1927, said plaintiff caused American Automobile Fire Insurance Company to be organized for the purpose of writing certain types of automobile insurance, including fire. Since said respective dates, plaintiffs have engaged in operating and conducting automobile insurance and automobile fire insurance businesses. In about the year 1943 plaintiffs purchased Associated Indemnity Corporation, an insurance corporation, and Associated Fire and Marine Insurance Company, an insurance corporation. Plaintiff and these two last named insurance companies have completely or substantially a common ownership. The business of each is conducted from the same location. Plaintiffs have qualified to transact an insurance business, [22] and conduct substantial business, in all of the States of the United States, and are reputable and well regarded by other persons, firms and corporations engaged in the insurance business.

V.

Prior to 1944 plaintiffs advertised in trade journals under the complete corporate name of each of them and in some instances under the name "American Auto." Such trade journals were designed and intended to and did circulate among persons engaged in the insurance business and were not intended or designed to and did not reach or circulate among the public generally. Prior to 1944 letter-size folders were prepared by plaintiffs and made available and distributed to insurance brokers and agents for the purpose of being distributed by the latter to their clients, which folders contained some reference to plaintiffs by the name "American Auto." These folders were not widely distributed among the public by said brokers or agents nor were they distributed to any substantial extent whatsoever. Except for isolated instances occurring approximately ten years ago, plaintiffs have never at any time advertised and do not now advertise through any medium of general circulation among the public or in any manner calculated or designed to or which does reach the public generally under the name "American Auto" or otherwise.

VI.

Since 1944 plaintiffs have advertised in such trade journals as described above under the name "American Associated," or "American Associated Insurance Companies"; and when plaintiffs' names do appear in such advertising each is spelled out in

full. Since 1944 there has been an effort on the part of plaintiffs to have their companies known as "American Associated" or "American Associated Insurance Companies" and the evidence shows and the Court hereby finds that plaintiffs desire and are making an effort to be known as "American Associated" and "American Associated Insurance Companies" rather than "American [23] Auto." Since 1944 neither of plaintiffs has made an attempt nor indicated any desire to become known as or to identify themselves or either of them with the name "American Auto."

VII.

Since 1944 plaintiffs have made no attempt to expand their automobile insurance business but rather have endeavored to limit it, and since said date are and have been primarily devoting their efforts to the development and expansion of other types of insurance issued by their "associated" companies.

VIII.

The words "American Auto" are not unique either individually or in combination.

IX.

Neither of plaintiffs solicit automobile insurance business from, or sell the same directly to members of the public. The business of plaintiffs and each of them is conducted through independent insurance brokers and agents who have their own clientele. In substantially every case the client or customer of

said broker or agent does not specify any particular insurance company which he wishes to issue the policy he is purchasing. In the overwhelming percentage of cases such brokers or agents themselves select the company in which any given policy of insurance is placed.

X.

Plaintiffs are known to some insurance brokers and agents as "American Auto" but such brokers and agents are also familiar with and know the true and full names of plaintiffs and each of them and are familiar with and know the organization, entities and places of business of plaintiffs and each of them. Such brokers and agents are insurance experts and are especially educated and well informed within the field of insurance and are well aware of the identities of the insurance firms with which [24] they deal and with whom they place their business. No confusion will result among such brokers and agents from the use by defendant of its corporate name, to wit: "American Auto Club." Such brokers and agents will not confuse the identities of plaintiffs or either of them and defendant in the event that defendant is permitted to and does use its said corporate name.

XI.

Plaintiffs are not and neither of them is known to the public as "American Auto" and the name "American Auto" is not understood to be nor is it identified with plaintiffs or either of them widely,

commonly, publicly or generally; and neither the name "American Auto" nor either of the words thereof has acquired a secondary meaning.

XII.

There is and has been no intent on the part of defendant to capitalize upon, or in any way take advantage of any similarity which exists between its said corporate name and the names of plaintiffs or either of them and there is and has been no intent on the part of defendant to compete unfairly in any manner with plaintiffs or either of them by virtue of any such similarity which might exist. Defendant selected its name honestly and in good faith. Defendant's use of its name "American Auto Club" has been permitted both by the Secretary of State and the Insurance Commissioner of the State of California.

XIII.

Defendant is not doing and does not intend to do business under the name "American Auto" or any name other than "American Auto Club."

XIV.

Neither of plaintiffs will be injured or damaged by reason of the use by defendant of its said corporate name.

XV.

Defendant is not doing an [25] insurance business in the State of California or in any state, and is not engaged and its purpose is not to engage in the

business of selling insurance, although to do so is within its corporate powers. One of defendant's purposes is to aid its members by referring them to insurance agents and brokers for the purpose of obtaining automobile insurance.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. No secondary meaning exists, has attached to or developed in connection with the name or words "American Auto" or either thereof.

3. Plaintiffs have no ownership of or property interest in or right to the name or words "American Auto" or either thereof sufficient to enable it to preclude, or object to the use thereof by other persons or firms.

4. Defendant has not competed and will not compete unfairly with plaintiffs or either of them by any use of the name or words "American Auto Club" or "American Auto" and has not competed and will not compete unfairly by representing itself as being, or as being affiliated or connected with plaintiffs or either of them.

5. Defendant has the right to use the name or words "American Auto Club" in carrying on its business.

6. Plaintiffs are not entitled to the injunction prayed for or to any relief whatsoever.

7. Defendant is entitled to judgment in its favor, and to recover its cost of suit incurred herein.

A decree may be entered accordingly.

Dated: December 15, 1949.

/s/ C. E. BEAUMONT,

U. S. District Judge.

[Endorsed]: Filed December 15, 1949. [26]

In the District Court of the United States for the Southern District of California—Central Division

No. 8032-B

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, and AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

AMERICAN AUTO CLUB, a corporation, JOHN DOE ONE TO TEN, JANE DOE ONE TO TEN and DOE CORPORATION ONE TO TEN,

Defendants.

JUDGMENT

The above entitled cause having come on regularly for trial in the above entitled Court on the 4th, 5th, 6th and 7th days of January, 1949, before the

Honorable Campbell E. Beaumont, Judge presiding, plaintiffs appearing by their counsel, Messrs. Parker, Stanbury & Reese, and defendant American Auto Club, a corporation, appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, and evidence, both oral and documentary, having been submitted to the Court, and the Court, being duly advised, having ordered judgment for defendant American Auto Club, a corporation, and having filed herein its findings of fact and conclusions of law in writing, [27]

Now, Therefore, by reason of the premises and of the findings of fact and conclusions of law aforesaid,

It Is Ordered, Adjudged and Decreed:

1. That plaintiffs, American Automobile Insurance Company, a corporation, and American Automobile Fire Insurance Company, a corporation, take nothing by their action and that the same be and it is hereby dismissed with prejudice; and that judgment be and it is hereby ordered and made in favor of defendant American Auto Club, a corporation, and against plaintiffs American Automobile Insurance Company, a corporation, and American Automobile Fire Insurance Company, a corporation, and each of them.

2. That defendant American Auto Club, a corporation, do have and recover of and from plaintiffs

its costs herein incurred, hereby taxed in the sum of \$65.70.

Dated: December 15, 1949.

/s/ C. E. BEAUMONT,

Judge of the U. S. District
Court.

Lodged November 28, 1949.

[Endorsed]: Filed and entered December 15,
1949. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiffs American Automobile Insurance Company, a corporation, and American Automobile Fire Insurance Company, a corporation, and each of them, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that said judgment and the whole thereof entered in favor of defendants and against plaintiffs in this action on the 15th day of December, 1949, in Judgment Book No. 62, at page 568.

Dated: January 14, 1950.

PARKER, STANBURY &
REESE,

By /s/ RAYMOND G. STANBURY,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 14, 1950. [29]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That American Automobile Insurance Company, a corporation organized and existing under the laws of the State of Missouri and duly qualified for the purpose of making, guaranteeing or becoming Surety on bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto American Auto Club, a Corporation et al, Defendants and Respondents, in the penal sum of Two Hundred Fifty and no/100 Dollars (\$250.00), to be paid to said American Auto Club, a Corporation et al, Defendants and Respondents, their heirs and assigns, for which payment well and truly to be made the American Automobile Insurance Company binds itself, its successors and assigns, firmly by these presents.

Signed, Sealed and Dated this 13th day of January, 1950.

The Condition of the Above Obligation Is Such, That Whereas, the American Automobile Insurance Company, a Corporation and American Automobile Fire Insurance Company, a Corporation, plaintiffs and Appellants in the above entitled suit, are about to take an appeal to the United States Court of Appeals, Ninth Circuit, to reverse a judgment made, rendered and entered on the 15th day of December, 1949, by the District Court of the

to be the person who executed the said instrument on behalf of the said corporation, and he duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles, the day and year in this certificate first above written.

[Seal] /s/ ENID N. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 13, 1951.

[Endorsed]: Filed January 14, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Plaintiffs herein having lately filed their notice of appeal from the judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit Court, hereby designate the following portions of the record and proceedings in this case, which is the complete record, to be contained in the Record on Appeal.

1. Amended complaint for injunctive relief.
2. Answer to amended complaint.
3. Findings of fact and conclusions of law.

4. Plaintiffs' exceptions to proposed findings.
5. Judgment.
6. All exhibits received in evidence.
7. Complete transcript of testimony and proceedings, a copy of which (the original) is filed herewith. [32]
8. Notice of appeal to the Circuit Court of Appeals.
9. Cost bond on appeal.
10. Designation of contents of Record on Appeal.
11. Docket entries.

PARKER, STANBURY &
REESE,

By /s/ RAYMOND G. STANBURY,
Attorneys for Plaintiffs, American Automobile Insurance Company and American Automobile Fire Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 1, 1950. [33]

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

- Mar. 8—Fld complt for injunctive relief. Issd sum.
Made JS-5 Report.
- Mar. 15—Fld sum ret serv.
- Apr. 1—Fld stip and ord that defts hv to & includg
4/19/48 to answer only.
- Apr. 20—Fld Answer deft.
- June 7—Ent ord setting for trial 10/19/48, 10 AM.
“B” cal.
- Oct. 7—Ent Ord placing cause on cal 10/11/48
10 AM for resetting and notified counsel.
- Oct. 11—Ent ord resetting cause for tr on 12/1/48
10 a.m.
- Nov. 24—Fld plf’s no of mo retble 12/1/48 to
amend compl.
- Nov. 29—Fld affids R G Stanbury & Don R Ses-
sions.
- Dec. 1—Ent ord cont to 12/9/48 10 a.m. for trial
or fur proceedings. Couns notif.
- Dec. 3—Ent ord cont fr 12/9/48 to 12/15/48 10
a m for hrg or trial.
- Dec. 11—Fld no mo dft to amend answ, ret December
15, 1948, 10 a m.
- Dec. 14—Fld depos of Don R Sessions tkn 10/9/48.
- Dec. 15—Ent proc & ord granting motions to amend
purs stip. Fld amended compl. Ent ord
cont to 1/4/49 10 a m for trial.
- Dec. 22—Fld dft’s answer to amended compl. Fld
dft’s amended answer to compl.

1949

- Jan. 4—Ent proc trial. Fld plfs Exhs 1-8 incl & defts Exhs A-E incl. Ent ord cont to 1/5/49 9:30 AM for trial. (B)
- Jan. 5—Ent proc fur trial. Fld plf's exhs 10-14-incl & deft's exhs I, J, K, M, N & mkd deft's exhs F, G, H, L. Ent ord cont to 1/6/49 2 PM for fur trial (argument).
- Jan. 6—Ent proc trial. Fld deft's Exh O. Ent ord cont to 1/7/49 10 AM for fur trial (fur argument).
- Jan. 7—Ent proc fur trial & ord denying relief prayed for by plf & drctg attys for deft prepare findings & judgmnt in favor deft. (B)
- Jan. 27—Fld pltfs exceptions to proposed findgs fact.
- Feb. 15—Fld pltfs memo of pts & auths.
- Feb. 24—Lodged defts proposed findgs of fact & concls of law. Ent ord placg on cal for settlg findgs at 3/7/49, 3 PM.
- Mar. 7—Ent ord cont to 3/28/49, 10 AM for settg settlmnt of findgs.
- Mar. 28—Ent ord cont to 3/29/49 2 pm for settlmnt of findings.
- Mar. 29—Ent proc & ord deferring settlmnt of findings pending flg of rptrs trans.
- Apr. 18—Fld reptrs transe predgs (partial) 1/7/49.
- June 29—Fld ord on stip plfs ex 1 may be withdrawn & photostatic copy subst, orig ex to be retd to file prior to time of appeal.

1949

- Aug. 2—Fld reptrs transe prodgs 1/4, 1/5, 1/6 & 1/7/49.
- Nov. 28—Fld stip waiving fur hrg on plf's excepts to proposed findings. Lodged proposed judgment.
- Dec. 15—Fld finds fact & concls law. Fld & ent JBK 62/568 judgment favor deft American Auto Club against plf & for defts costs, and dismiss with prej. Dktd. Not attys. Made JS 6.
- Dec. 21—Fld defts memo costs & disbrsmts.
- Dec. 23—Fld notice of intention of plfs to move for new trial.
- Dec. 31—Fld defts notice of taxation of costs with affid advce by mail.

1950

- Jan. 11—Taxed costs favor deft at \$65.70. Dock & ent costs.
- Jan. 14—Fld plfs notice of appeal. Fld cost bond on appeal, \$250.
- Feb. 1—Fld plfts design of contents of rec on appeal. Fld reporters transe prodgs 1/4, 1/5, 1/6, & 1/7/49.

In the District Court of the United States for the
Southern District of California, Central Division

No. 8032-B Civil

AMERICAN AUTOMOBILE INSURANCE
COMPANY, a corporation, and AMERICAN
AUTOMOBILE FIRE INSURANCE COM-
PANY, a corporation,

Plaintiffs,

vs.

AMERICAN AUTO CLUB, a corporation, JOHN
DOE ONE TO TEN, et al.,

Defendants.

Honorable Campbell E. Beaumont, Judge presiding

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, January 4, 1949

Appearances

For the Plaintiffs:

PARKER, STANBURY & REESE, By
RAYMOND G. STANBURY, ESQ.

For the Defendants:

BRONSON, BRONSON & McKINNON, By
FREDERICK A. POTRUCH, ESQ., and
EDGAR H. ROWE, ESQ. [1*]

* * *

* Page numbering stamped at top of page of original Reporter's Transcript.

WALTER MULLER

called as a witness under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as' follows:

* * *

Direct Examination

By Mr. Stanbury:

Q. Mr. Muller, you are the president of the defendant company, American Auto Club, are you not, sir? A. Yes, sir. [3]

Mr. Stanbury: Counsel very kindly furnished me with copies of the Articles of Incorporation of that company and also a Prospectus which it proposes to use, and I assume we may accept these as accurate copies of those on file?

Mr. Rowe: Those are accurate copies of the originals on file.

Mr. Stanbury: If the court please, this is the only copy that counsel have. I am not anxious to introduce them in evidence if we may read pertinent portions therefrom.

The Court: That is very satisfactory to the court.

Mr. Stanbury: All right. From the Articles of Incorporation of the defendant company, under its powers the purposes for which this corporation is formed are:

“(a) To act as insurance agents and brokers in obtaining, selling and writing insurance of all kinds,

(Testimony of Walter Muller.)

including liability insurance and automobile insurance.

“(b) To act as agents, attorneys in fact, brokers, adjusters for individuals, firms, associations or corporations and particularly those owning, operating, using and maintaining motor vehicles.”

Then skipping down to (d) and reading only part of it:

“To furnish, in connection with the ownership, operation, use or maintenance of motor vehicles [4] any or all of the following types of motor service as defined in the Insurance Code of California:”

I am skipping several.

“* * * claim adjustment, license and insurance services.”

Then in the proposed Prospectus of this company, upon the face of which is an application for membership, on the back among other things is the following:

“Insurance Service. The club will assist members in obtaining through a qualified agent or broker insurance covering liability of or loss by such member resulting from injury or damage to personal property arising out of an accident involving the ownership, maintenance, operation or use of a motor vehicle.”

Q. (By Mr. Stanbury): Now, Mr. Muller, your company was first organized as the Auto Club of Hollywood, was it not? A. Yes, sir.

Q. Now, it never did business under that name, did it? A. No, sir.

(Testimony of Walter Muller.)

Q. But an amendment was later filed in the present name, namely, American Auto Club, was it not? A. Yes, sir. [5]

Q. This company, American Auto Club, has not as yet transacted business of any kind, has it?

A. No, sir.

Q. You were organized sometime in the summer of 1947, were you not? A. Yes, sir.

Q. And in September of 1947, and, namely, on September 15th, it is admitted that you received a protest from these plaintiff companies concerning the use of this name; that is correct, is it not?

A. Yes, sir.

Q. And you have deferred commencing business under the name American Auto Club pending the outcome of this law suit, have you not, sir?

A. Yes, sir.

Q. As of this date you have not had any of your final printing done of any forms or papers of any kind, have you?

A. Only the application for members.

Q. How many of those have you had printed?

A. Several copies.

Q. You mean just a few copies for reference?

A. Yes, sir.

Q. You haven't had as many as a hundred printed, have you? A. No, sir. [6]

Q. And you haven't had any emblems made yet, have you?

A. We have had designs for emblems made.

Q. But you haven't manufactured any?

(Testimony of Walter Muller.)

A. No, sir.

Q. And you have no telephone listing as yet, have you? A. No, sir.

Q. You have no arrangement with any insurance company as yet for whom or which you intend to broker or act as agent in the sale of insurance, have you? A. No, sir.

Q. You have done no advertising yet, have you?

A. No, sir.

Q. In other words, other than being in the planning stage you haven't commenced operations of any kind at all in this name American Auto Club yet, have you?

A. Only in the preparation of the organization and outlining a plan for establishing the club.

Q. Everything you have done so far, aside from the presence on your proposed emblems and application forms of this word "American Auto Club," would apply if you took another name tomorrow, would it not? A. Yes, sir.

Q. That is, you could swing right into your operations under another name if there were one satisfactory to you? [7] A. Yes, sir.

Q. As an automobile club if you are authorized to do business under this name you intend to provide your members with emblems to be displayed on their automobiles, do you not?

A. Yes, sir.

Q. At the present time you have a design for that emblem, have you not? A. Yes, sir.

Q. What shape is that? A. It is——

(Testimony of Walter Muller.)

* * *

Q. (By Mr. Stanbury): Your counsel has just handed me this design, and I assume that that is the design which you—

A. That other one (indicating).

Q. He has handed me two, and I assume those are the two designs under consideration to be furnished to your members? A. Yes, sir.

Q. To be used on their automobiles?

A. Yes, sir.

Q. Have you decided on which one you would use? A. This one here. [8]

Q. The blue one? A. Yes.

Q. Which contains the word "American" over the top, and "Auto Club" beneath? A. Yes.

Q. And a spreading eagle and a shield in the center? A. Yes, sir.

Mr. Stanbury: Is there any objection to this being offered in evidence?

Mr. Rowe: None at all.

Mr. Stanbury: I will offer this as Plaintiffs' first in order, your Honor.

The Court: Let it be received as Plaintiffs' Exhibit No. 1.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 1, and was received in evidence.)

Q. (By Mr. Stanbury): Then as part of your service as an automobile club, regardless of the

(Testimony of Walter Muller.)

name under which you may operate, you intend to act as agent or broker for the issuance of automobile liability insurance and other forms of automobile insurance for your members, do you not?

A. No, sir.

Q. What insurance service are you going to render?

A. We will assist the members in every way possible [9] in obtaining proper insurance, whatever is necessary for their operation of their cars, or in any way that they ask us to assist them.

Q. You intend to make some arrangement with some insurance company, some insurance agent or some insurance broker for this purpose, do you not?

A. We intend to make an arrangement with maybe several brokers.

Q. In other words, you intend to furnish your members with a service which will put them in contact with some broker or agent through which or from whom they may obtain automobile insurance, do you not?

A. Yes, sir.

Q. All lines of automobile insurance?

A. Yes, sir.

Q. Then when you operate as a club under whatever name it may be, you intend to render claims service to your members, do you not?

A. Insofar as the members, if they have an accident of any kind and they have the need for insurance, we will assist them in getting in touch with the proper adjusters in whatever company they are insured with.

(Testimony of Walter Muller.)

Q. What claims service do you intend to furnish?

A. We don't intend to give any claims service except to assist the member in getting the proper adjustment if they [10] have the need for contact with their insurance carrier.

The Court: What form will that assistance take, Mr. Muller?

The Witness: For instance, if a man had an accident, and he would call us up, we would check up with his insurance policy and then get the proper adjuster to make the necessary adjustment for his claim with the insurance company, whichever insurance company it was.

The Court: You say "make the necessary adjustment"; would you just have them contact each other?

The Witness: That's right.

The Court: Or go further?

The Witness: No. We would get the adjuster in contact with the customer so that they would make the proper adjustment there.

The Court: You say "proper adjustment"; that is rather comprehensive.

The Witness: In other words, we would assist them—we would assist the member in every way possible to help them on their insurance problems.

The Court: And the adjustments also?

The Witness: On anything pertaining to their——

The Court: Anything pertaining to automobile insurance?

(Testimony of Walter Muller.)

The Witness: Automobile, yes.

The Court: Go ahead. [11]

Q. (By Mr. Stanbury): You intend—I am referring to your deposition and not intending to put words in your mouth—you intend to render to your members whatever claim service is rendered by the Automobile Club of Southern California, do you not?

A. Ours would be a little different, because the Automobile Club of Southern California have their own insurance company and they have their own adjusters. We couldn't go that far, because we wouldn't have any insurance company of our own, we wouldn't have any insurance agency whatsoever. We would only assist our members in making the proper connection with the adjusters, because we couldn't have any adjusters of our own because we wouldn't have any insurance company.

Q. You intend to take the accident reports from your members, do you not? A. Yes, sir.

The Court: Will you read that part of the instrument from which you first read, subdivision (b), about adjusters, please, Mr. Stanbury?

Mr. Stanbury: Yes, sir.

“To act as agents, attorneys in fact, brokers, adjusters for individuals, firms, associations or corporations and particularly those owning, operating, using and maintaining [12] motor vehicles.”

Under subdivision (d) is the reference to claim adjustment.

(Testimony of Walter Muller.)

Mr. Rowe: May it please the court, may I interrupt so that the record will be complete on each point?

The Court: Yes.

Mr. Rowe: I would like to call your Honor's attention at this point to the paragraph in the application from which counsel read earlier, the application for membership, which is——

The Court: You have some of those, why don't you file that?

Mr. Rowe: I would like to file one and call your Honor's attention at this point to the paragraph dealing with insurance service, with the comment that that paragraph contains a complete statement of the insurance service which this club proposes to offer to its members.

Mr. Stanbury: That is one I read, did I not?

Mr. Rowe: I think you did. May I make this a defendant's exhibit?

Mr. Stanbury: I will make it plaintiffs' next in order, if you like.

Mr. Rowe: That is all right.

The Court: Let it be received, then, as Plaintiffs' Exhibit 2. [13]

* * *

Q. (By Mr. Stanbury): Mr. Muller, in assisting your members in obtaining automobile insurance you intend to do that under an arrangement whereby the American Auto Club would obtain (a), an overriding percentage of some sort?

(Testimony of Walter Muller.)

A. No, sir.

Q. You are at the present time one of the proprietors of Muller Brothers, are you not?

A. Yes, sir.

Q. Do you intend to transfer your insurance activities from Muller Brothers to the American Auto Club? A. No. Vice versa.

Q. What do you mean by that?

A. Muller Brothers are an insurance agent at the [14] present time. Any reference of insurance would be referred to Muller Brothers.

Q. The stockholders of the American Auto Club are you and your brother? A. Yes, sir.

Q. And who else? A. My wife.

Q. All right. And the three of you are owners of the business Muller Brothers, are you not?

A. The two of us.

Q. There are two brothers? A. Yes.

Q. You and your brother are?

A. Yes, sir.

Q. At the present time you are insurance brokers, are you not?

A. We are insurance agents.

Q. Agents for some particular company?

A. Several companies.

Q. All right. In that capacity you of course receive a percentage on business written, do you not? A. Yes, sir.

Q. So that when you operate your Auto Club under whatever name you will refer your members

(Testimony of Walter Muller.)

to Muller Brothers as an insurance agent to obtain insurance with companies [15] with which Muller Brothers has an agency, is that right?

A. Muller Brothers would be one of the agents that the Auto Club—that the Automobile Club would refer to, among other agents. We will assist a member in any way that he wants to purchase insurance in whatever company he wants. We might not be an agent—Muller Brothers might not be an agent for the company he has a preference for or the company he desires to insure with.

The Court: Are Muller Brothers agents for more than one company?

The Witness: Yes, sir.

The Court: Go ahead, Mr. Stanbury?

Q. (By Mr. Stanbury): Have you changed your intentions with reference to obtaining a profit from insurance business through your Auto Club since your deposition was taken on October 8th of last year, '48? A. Not necessarily.

Q. If you will look, Mr. Muller, at your deposition, page 8, line 6, to the bottom of the page, line 26, just read it to yourself, will you, and tell me when you have finished it. A. Yes, sir.

Q. The Mr. Sessions referred to there is the Mr. Sessions who is the vice-president of the plaintiff companies, is he not? [16] A. Yes, sir.

Q. "Q. By way of illustration, when one buys insurance through the Automobile Club of Southern California they buy in the Standard Accident of

(Testimony of Walter Muller.)

Detroit, as I understand it. Do you propose to render a service to the members of the American Auto Club, if they wish it, which would refer them to some insurance company with which the American Auto Club would have some arrangement, is that right? “A. That is right.

“Q. Now, have you approached any insurance company as yet with this proposition?

“A. We had in mind approaching Mr. Sessions, if he had a good enough discount for us to operate.

“Q. Have you done that yet?

“A. No, sir.

“Q. When I say ‘you’ I mean the American Auto Club also.

“A. That is me, the same thing.

“Q. That is right. Have you actually approached any company with this proposition?

“A. No, sir.”

I have correctly read that, have I not?

A. Yes, sir. [17]

Q. Now, at the time you gave your deposition it was your intention to approach some insurance company to see if you could get a satisfactory discount on insurance rates, was it not?

A. Well, I guess I was confused in your questions and my answers there at that time. The arrangement was to be made through Muller Brothers who were to be the agents, and who have always been insurance agents.

Q. When you say “We had in mind approaching Mr. Sessions if he had a good enough discount for

(Testimony of Walter Muller.)

us to operate," you meant making some kind of arrangement which would give you in some capacity an overriding profit on insurance written?

A. Through Muller Brothers.

Q. You say that is through Muller Brothers?

A. Yes, sir.

The Court: And if your client, that is, of the Automobile Club, desired some other insurance company, then the Automobile Club would make nothing out of that, that would go to the other agents?

The Witness: Yes.

The Court: That is the same as Muller Brothers?

The Witness: Yes. There are a lot of people that have a preference for a certain insurance company, and we would just assist them in making the proper contacts with any other [18] agent or any other insurance company. That would just be a function; one of the functions of the Auto Club is the insurance function, along with a lot of other services.

The Court: We are just discussing this particular phase of it now, as to the matter of the discount referred to. Was that discount to inure to the benefit of Muller Brothers only, or to the Auto Club only, or to both of them in part?

The Witness: It would be a benefit to Muller Brothers or any other agent who would write the insurance.

The Court: The policy?

The Witness: The policy, yes.

(Testimony of Walter Muller.)

The Court: And the Auto Club as such would derive no financial benefit from that transaction?

The Witness: No, sir.

Q. (By Mr. Stanbury): If a man came to you or came to the American Auto Club, or your Auto Club under any name, and said he wanted automobile insurance and did not designate a company, you would refer him to Muller Brothers?

A. Yes, sir.

Q. And the premises are all in the same offices, the office is the same, is it not?

A. We hadn't intended them to be.

Q. Have you any site selected for the American Auto Club? [19]

A. 6367 Sunset Boulevard. Across the street.

Q. Across the street from your present place, Muller Brothers? A. Yes, sir.

Q. If a person came to you and said and insisted on being insured in, let us say, the Travelers Company, with which Muller Brothers had no connection, then you would refer them to Travelers?

A. Yes, sir.

Q. You would either call up an agent of Travelers or tell them to phone Travelers?

A. That's right.

Q. The American Auto Club has no members whatever now, has it? A. No, sir.

Mr. Stanbury: I have no further questions at this time.

* * *

DON R. SESSIONS

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [20]

* * *

Direct Examination

By Mr. Stanbury:

Q. Mr. Sessions, you are a vice-president of each of the two plaintiff companies, are you not?

A. That is correct.

Q. And as such as you in charge of their Pacific Coast business? A. Yes, I am.

Q. How many offices do these companies have on the Pacific Coast?

A. Four branch offices.

Q. Seattle, Portland, San Francisco and Los Angeles, are they not? A. Yes.

Q. Is that right? A. That is correct.

Q. In what year were these companies organized? Let us take first the American Automobile Insurance Company, when was it organized?

A. It was organized in December, 1911, and started business January 1st, 1912.

Q. And the American Automobile Fire Insurance Company, was organized when?

A. In 1927. [21]

Q. Has the American Automobile Insurance Company been doing business continuously since January 1st, 1912? A. It has, yes.

Q. And the Fire Company since 1927?

(Testimony of Don R. Sessions.)

A. That's right.

Q. And in how many states of the Union are the plaintiff companies organized to do business?

A. In all states of the Union.

Q. In how many states of the Union are they doing business? A. In all states, I believe.

Q. Have you got the figures of the premium income of the American Automobile Insurance Company for 1948 yet? A. No, I have not.

Q. What was it for 1947?

A. The American Auto Insurance Company, it was approximately thirty million dollars.

Q. That is the American Automobile Insurance Company only, is it not? A. That's right.

Q. Do you have any separate figures on the Fire Company?

A. I have them with me. I believe I could find them.

Q. Do you have in mind now the approximate amount for 1947? [22]

A. Probably about five or six million.

Q. So the two companies combined in 1947 had a premium intake of around thirty-five or thirty-six million dollars? A. That's right.

Q. Can you tell us whether the trend in 1948 was upward or downward?

A. It was upward.

Q. So that it is more than that in '48?

A. That is correct.

Q. Sometime a few years ago the plaintiff com-

(Testimony of Don R. Sessions.)

panies entered into some sort of combination with the Associated Indemnity Company, did it not?

A. We purchased the Associated Indemnity.

Q. When was that? A. In August, 1943.

Q. Will you differentiate, take your time and give us a simple statement of the differentiation between the American Automobile Insurance Company, the American Automobile Fire Insurance Company, and the Associated Indemnity Company, with particular reference to the kind of insurance, if there is any difference, each one carries.

A. The American Auto Insurance Company writes chiefly automobile insurance, but also Workmen's compensation, general liability, burglary, plate glass. We write in the American Auto Fire the fire and collision coverages for [23] automobile and inland marine. In the Associated we mainly write workmen's compensation, some general liability, no automobile insurance any more, at least in California.

Q. Where is the California automobile insurance issued by any of these groups placed, any of these companies? In which of the three companies?

A. In the American Auto and American Auto Fire.

Q. The American Auto Fire has the collision and fire? A. Fire, theft and collision.

Q. Fire, theft and collision. The liability is in the American Automobile Insurance?

A. And the property damage.

(Testimony of Don R. Sessions.)

Q. So that all of the automobile liability insurance is in the American Auto Insurance Company? A. That is correct.

Q. All right. Approximately how many policies—I am not talking about limits of liability, but policies—are outstanding from the Los Angeles office at this time of the group.

The Court: Of the three?

Mr. Stanbury: Yes, of the three, sir.

A. Approximately fifty thousand.

Q. (By Mr. Stanbury): What percentage, approximately, are those issued by the American Auto or the American Auto Fire Insurance Companies?

A. Probably 80 per cent.

The Court: Let me see if I understand that. The premiums of the first two companies, and that is the two plaintiff companies named, in the Los Angeles area would be about \$40,000 annually, is that correct?

The Witness: No. He asked me what they were nationally, I understood.

Mr. Stanbury: Policies, I said.

The Court: I didn't understand it.

The Witness: Policies this last time.

Mr. Stanbury: I just asked about policies. Before it was dollars.

The Court: Read it back, Mr. Goldstein.

(The record was read by the reporter.)

The Court: 80 per cent of them would be writ-

(Testimony of Don R. Sessions.)

ten in the names of the plaintiff companies in the Los Angeles area?

Mr. Stanbury: Yes. And thirty million would be premiums all over the country.

The Court: Now, I want to be sure the court has it straight. I want to restate it. The premiums in the American Automobile Insurance Company amounted in 1947 to about \$30,000,000 in the United States?

Mr. Stanbury: Yes, sir.

The Court: Is that correct?

The Witness: Approximately so. [25]

The Court: And in the American Automobile Fire Insurance Company about five or six million dollars?

The Witness: Yes.

The Court: Then the total number of policies of these two companies issued or in effect in 1947 in the Los Angeles area was about 40,000?

The Witness: That is correct.

Mr. Stanbury: Are you aware of the existence anywhere in the United States of any other insurance company having a combination of words of American Automobile or American Auto?

The Witness: There are none to my knowledge, and the records of the insurance companies published by Best Insurance Record shows none either.

Q. (By Mr. Stanbury): You have those books here? A. I have them with me.

Q. Do you know of an organization known as the American Automobile Association?

(Testimony of Don R. Sessions.)

A. I do.

Q. What sort of organization is that?

A. They are a parent organization whose headquarters are in Washington, with which are affiliated a large number of local automobile clubs. Each one operates under a local name and not using the name American Automobile Association.

Q. Does the American Automobile Association sell or [26] render insurance service to its members or to anyone in that name, the American Automobile Association, so far as you are aware?

A. They do not, so far as I know.

Q. Can you give us a few examples of their member clubs which do deal with the public in insurance matters?

A. Among the affiliated clubs are the Automobile Club of Southern California, the California State Association, State Automobile Association, Chicago Motor Club, Detroit Auto Club, Missouri Motor Club, all under their own local names.

Q. Do you know of any organization, whether it be club or a company, or a mutual, any organization which renders insurance service or claims service in connection with automobiles or any other field under any name which combines American Auto or American Automobile, so far as you are aware?

A. I do not.

The Court: That one in Washington, what is the title?

The Witness: I don't know.

(Testimony of Don R. Sessions.)

The Court: I thought you mentioned one.

Mr. Stanbury: He said headquarters in Washington.

The Witness: Yes, the parent organizations.

The Court: What is the title of that?

The Witness: American Automobile Association.

Q. (By Mr. Stanbury): Does it sell insurance or render insurance service in that name anywhere in the country, to your knowledge?

A. It does not.

Q. Its member club here is the Automobile Club of Southern California? A. Yes.

Q. All right. Have these plaintiff companies done any advertising in the name "American Auto" only?

A. Yes, we have done a great deal of it.

* * *

Q. (By Mr. Stanbury): Over what period of time?

A. Our advertising on a large scope began perhaps in the early '30s.

Mr. Rowe: I move to strike the "large scope" as a conclusion of the witness, your Honor.

The Court: I think he is probably in a position to give that without being a conclusion. The motion is denied.

Q. (By Mr. Stanbury): And continued until when, Mr. Sessions?

A. It still continues, but under the name of American Auto only it continued to 1944.

(Testimony of Don R. Sessions.)

Q. That is the time the consolidation was made with the [28] Associated Indemnity Company?

A. It was shortly after that.

Q. Do you know whether or not the words "American Auto" at the present time designate any organization in the insurance world?

A. Not to my knowledge.

Mr. Rowe: Just a moment, your Honor. Were you asking him if those words were in a name? Your question is not clear to me.

Q. (By Mr. Stanbury): Have you for the purpose of this law suit brought to court with you samples of advertising put out by these plaintiff companies? A. Yes, we have.

Q. Have you made any attempt to make this exhaustive?

A. No; these are just samples.

Q. These are examples of advertising done by these companies? A. That's right.

Mr. Rowe: May I ask, Mr. Stanbury, if the point here is that many years ago you advertised American Auto, but now you do not?

Mr. Stanbury: No. The point is that up to 1944 American Auto was habitually the name under which these companies advertised, as shown by these advertisements; that since 1944 they have not advertised as American Auto, [29] but we expect to prove that the name is firmly established as a result of past practice and still exists, but not as an advertising medium for these companies.

(Testimony of Don R. Sessions.)

Mr. Rowe: As a matter of fact, isn't it true that since 1944 and the acquisition by these two companies of the Associated Indemnity Company, and the other one which you didn't mention, Associated—

Mr. Stanbury: I have mentioned the Associated Indemnity.

Mr. Rowe: Your Honor, he spoke of three in the group, but actually there are four companies in the group.

The Witness: That is right. Associated Fire and Marine.

Mr. Rowe: You overlooked the fourth company.

Mr. Stanbury: All right.

Mr. Rowe: Isn't it true that since 1944 your advertising has been American Associates, or American Associated Companies?

Mr. Stanbury: I just got through saying that the words "American Auto" were used as the advertising medium extensively all over the country until 1944.

Mr. Rowe: My question was whether I had correctly expressed the phrase which you now advertise to the public and have since 1944, namely American Associated?

Mr. Stanbury: No; American Associated is repeatedly used in advertising, but the names of these companies still [30] appear in all those ads, as far as I know.

Mr. Rowe: That is true, but the names—

(Testimony of Don R. Sessions.)

The Court: Evidently you can't agree, so you had better bring that out by evidence.

Mr. Rowe: We probably can. Your Honor, for the sake of the record I would like to make the objection that these documents, which counsel is going to introduce are incompetent, irrelevant and immaterial by reason of counsel's statement that no advertising is now being conducted, nor since 1944 has been conducted, under the name American Auto.

If your Honor has read counsel's trial memorandum, I think your Honor will find that counsel particularly limits his cause of action to a claim of a secondary meaning in two words, not "American Automobile," but "American Auto," and I think you will find that appears repeatedly in that trial memorandum.

If counsel is now about to say that these people have abandoned that in their advertising since 1944, obviously the secondary meaning has either been abandoned by counsel, if it ever had one, or they are not longer attempting to maintain it. It seems to me that this testimony would be incompetent, irrelevant and immaterial on those particular grounds.

The Court: The objection is overruled. The court will consider all those points before making a decision. [31]

* * *

Q. (By Mr. Stanbury): On the back page of

(Testimony of Don R. Sessions.)

the cover of Underwriters' Report is an ad "American Auto Agents Prosper" at the top of the page?

A. Yes.

Q. What is the Underwriters' Report?

A. It is a weekly insurance magazine published for the Pacific Coast in San Francisco.

Mr. Stanbury: These journals I will offer consecutively, your Honor, but the loose advertising I will offer as a group.

I will offer this as Plaintiffs' next in order, if the court please.

Mr. Rowe: If your Honor please, as I have already stated I will make the objection that the documents are incompetent, irrelevant and immaterial.

The Court: It is overruled. Can't they be introduced as one exhibit?

Mr. Stanbury: Surely.

Mr. Rowe: If they are introduced as one exhibit, the time limits of the publication should be indicated, your Honor.

Mr. Stanbury: It is printed on them, but I will so [34] designate in my questions.

Q. (By Mr. Stanbury): What is the Insurance Journal, Mr. Sessions?

A. It is an insurance paper published in Los Angeles.

Q. This is an issue of July, 1936, on the cover of which is an ad headed "American Auto Agents"?

A. Yes.

(Testimony of Don R. Sessions.)

Q. The next document is a copy of the Insurance Journal, January, 1937, with an ad on the cover headed "American Auto Agents"?

A. That's right.

Q. On page 6 an article of which the headline is "American Auto Votes Stock Dividend"?

A. Yes.

* * *

Mr. Rowe: May it be stipulated that my objection will precede each one of these offers, so that I won't have to interrupt on each occasion?

Mr. Stanbury: I will so stipulate.

The Court: So understood. The ruling will be the same.

* * *

Q. (By Mr. Stanbury): I will ask you, Mr. Sessions, if [36] that "American Auto" refers to these plaintiff companies? A. It does.

Mr. Stanbury: A June, 1937, issue of the Insurance Journal, we offer the cover, which consists of the advertisement headed "American Auto Agents." The Insurance Journal for January, 1938, we offer the cover containing an advertisement headed "American Auto Agents." The January, 1939, issue of the Insurance Journal, we offer the article in column 1 of page 6, headed "American Auto in Official Changes."

Q. (By Mr. Stanbury): I will ask you, sir: that refers to these plaintiff companies, does it not?

A. It does.

* * *

(Testimony of Don R. Sessions.)

Mr. Stanbury: February, 1939, issue of the Insurance Journal, we offer page 4, column 1, the article headed "American Auto in Strong Statement."

Q. (By Mr. Stanbury): That refers to your company, does it not? A. That is correct.

Q. That is your picture with the article?

A. That's right.

Mr. Stanbury: The May, 1939, copy of the Insurance Journal, the cover alone is offered, consisting of an advertisement headed "American Auto." The January, 1940, issue of the Insurance Journal, we offer the article on page 3, column 1, headed "American Auto Reports for Year."

Q. (By Mr. Stanbury): That refers to your company, does it not? A. It does.

Mr. Stanbury: The Insurance Journal for March, 1944, the cover only is offered, consisting of an advertisement in which the words "American Auto" appear in three places where checked in red pencil.

The May, 1944, issue of the Insurance Journal, the cover alone is offered, consisting of an advertisement in which the words "American Auto" appear in six places checked with red pencil.

The November, 1944, issue of the Insurance Journal is offered for its cover, consisting of an advertisement in which the words "American Auto" appear three times where checked in red pencil.

The April, 1946, issue of the Insurance Journal is offered for the article on page 7, column 3, headed,

(Testimony of Don R. Sessions.)

“American Auto enters bond field on Coast.” [38]

The Court: Is that last article referred to the company you are connected with?

The Witness: Yes.

Mr. Stanbury: The group I just referred to are offered as a combined exhibit, your Honor.

The Court: The objection is overruled and they may be received as Plaintiffs' Exhibit 3.

The Clerk: So marked.

(The documents referred to were marked Plaintiffs' Exhibit 3, and were received in evidence.)

Q. (By Mr. Stanbury): Now, I am showing you a sheet of newspaper upon which appears only a large advertisement, the top line of which is “American Auto gives you,” and down at the bottom the printer's identification containing the date 1936, and ask you if you can identify that, sir.

A. This was a newspaper advertisement which was run in various large cities of the country. This happens to be from Chicago. We also ran them out here in the Los Angeles Times.

Q. Does that refer to the plaintiff companies here? A. It does.

Q. And there are three others of similar appearance in which the words “American Auto” have been checked in red pencil in their various appearances. Is the same situation true of these?

A. It is.

(Testimony of Don R. Sessions.)

Q. And they all refer to the plaintiff companies here? A. That is correct.

Mr. Stanbury: I will offer these, if your Honor please, as Plaintiffs' next combined exhibit.

Mr. Rowe: I make the same objection.

The Court: Those advertisements appeared in various newspapers in the United States?

The Witness: That's right.

The Court: The same copy appeared in each paper at various places in the country at the time the advertising campaign was being conducted?

The Witness: That is correct.

The Court: Let them be received as Plaintiffs' Exhibit 4.

This is subject to the objection heretofore made. The same ruling.

The Clerk: So marked.

(The documents referred to were marked Plaintiffs' Exhibit 4, and were received in evidence.)

Q. (By Mr. Stanbury): In producing these advertisements in this last exhibit, Mr. Sessions, the four reproduced newspaper ads, have you made any effort at all to get a complete list of the ads run by these plaintiff companies?

A. No, we have not. [40]

Q. Your object has been to provide representative examples here? A. That's right.

Q. In producing here in Exhibit 3 various copies of the Insurance Journal and one copy of the Un-

(Testimony of Don R. Sessions.)

derwriters' Report, has any effort been made to trace through other insurance journals?

A. No, it has not.

Q. Or to make a complete list of references to the American Auto?

A. No; but these same ads appeared in all of the major insurance journals of the country.

Mr. Rowe: Just a moment. I will object to that on the ground the documents or papers themselves, or exemplars of those documents, are the best evidence of that fact.

Mr. Stanbury: I submit we wouldn't have to produce every ad in order to show that we ran them, if your Honor please.

The Court: I do not believe they would have to do that, Mr. Rowe, if Mr. Sessions was familiar with it.

Mr. Rowe: May I enter my objection that the proper foundation has not been laid.

Mr. Stanbury: It was a voluntary statement that I didn't ask for in the first place.

The Court: Yes, it was a voluntary statement.

Mr. Stanbury: So as far as I am concerned, it may be stricken.

The Court: It may go out.

Mr. Stanbury: Read the question that was pending there, Mr. Reporter, please.

(The record was read by the reporter.)

Mr. Stanbury: I stipulate that everything after "No" may be stricken as a voluntary statement.

(Testimony of Don R. Sessions.)

The Court: It may go out.

Q. (By Mr. Stanbury): You have collected the Insurance Journal and brought numbers here; that journal is published where?

A. In Los Angeles.

Q. Are there insurance journals published elsewhere in the United States?

A. Yes, a great many other cities.

Q. The advertisements that are shown on the covers of certain of these copies of the Insurance Journal, which are component parts of Exhibit 3, and which speak for themselves, do you know of your own knowledge whether those same ads were run contemporaneously or concurrently in other insurance journals?

A. I do, and they were so.

Mr. Rowe: I object to that upon the ground—

The Court: Let the answer except "I do" be stricken. [42]

Mr. Rowe: We are back to the question now? I object to the question upon the ground it is incompetent, irrevelant and immaterial, and it is too general, too broad in its scope. If there are insurance journals in other places, it seems to me we are entitled to know from this witness where those journals were published, and exactly which ones of them he knows or has seen similar advertising matter run in.

* * *

Q. (By Mr. Stanbury): Do you know of your

(Testimony of Don R. Sessions.)

own knowledge, Mr. Sessions, whether the advertisements which are contained on the covers of certain numbers of these Insurance Journals, which are part of Exhibit 3, and which have the words "American Auto" on them, were run concurrently or approximately concurrently in other insurance publications?

The Court: Answer it yes or no.

A. Yes.

Q. (By Mr. Stanbury): Can you tell us in what other insurance publications those advertisements were run?

A. I recall they were run in the National Underwriter of Chicago, the Pacific Northwest Reporter published in [43] Seattle. I recall it was in the Eastern Underwriter in New York, and I believe the Pacific Insurance of San Francisco.

Q. All right. The newspaper advertising of the type shown in the component sheets of Plaintiffs' Exhibit 4, was done over how great a period of time, if you know?

A. I believe approximately three months.

Q. During what year?

A. I don't know exactly, but approximately 1936.

Q. All right. Aside from the magazine and newspaper advertising referred to, have these plaintiff companies published pamphlets, other forms of advertising, of which I hold purported samples in my hand, in the name American Auto?

A. Yes, we have.

(Testimony of Don R. Sessions.)

Q. Up to what year, if you know, was that done in the name American Auto?

A. Up to approximately 1944.

Q. All right, sir. Through '44, or to it?

A. I don't know exactly.

Q. All right.

Mr. Stanbury: You gentlemen have examined that?

Mr. Rowe: Yes. If you could give us the starting time on that I would appreciate it, Mr. Stanbury.

Mr. Stanbury: I had dates on a lot of these, and I thought it was testimony without a foundation laid and I have erased a lot, and some of them can be read. They ran [44] from '35 through '44. Some of them have the dates printed on them, and I have copies of some with the penciled dates still on them that you gentlemen can see if you want to. There is one that I wish to offer separately, and the others as a group, if the court please.

Q. (By Mr. Stanbury): Calling your attention to one pamphlet upon the cover of which are the names of the plaintiff companies and the words "1942 Chart-O-Facts," can you tell me whether this is one of the publications made by these plaintiff companies? A. It is.

Q. What was done with that?

A. It was distributed to all agents and brokers in any quantity they ordered.

Q. What was the purpose of those?

(Testimony of Don R. Sessions.)

A. To show the record and history of our companies.

Q. Did any of this advertising go to the public?

A. Brokers and agents sent out most of this, and probably this too.

Q. You can't state about that particular one that you are holding in your hand?

A. No, that's right.

Q. Did the plaintiff companies provide their brokers and agents with large quantities of these things to be distributed if they so chose? [45]

A. On order from the agent and broker we did.

Mr. Stanbury: If your Honor please, and counsel, I have gone through this whole mass of advertising matter here and with a red pencil checked references to the words "American Auto" where they appear, and I would like the record to show that, that they are all marked with a red check, unless I overlooked some.

* * *

Q. (By Mr. Stanbury): Is there, as far as you are aware, any other insurance company in any field in the United States which combines these words "American Auto" or "American Automobile" in its name? A. No.

Q. Have you heard any nickname of any company other than your own companies of "American Auto"? A. No.

Mr. Stanbury: I will offer this Chart-O-Facts

(Testimony of Don R. Sessions.)

as a [50] separate exhibit next in order for the plaintiffs.

The Court: Let it be received and marked Plaintiff's Exhibit 5, and the ruling is made subject to the objection heretofore made.

(The document referred to was marked Plaintiffs' Exhibit 5, and was received in evidence.)

The Court: What about this American Automobile Association, Mr. Sessions?

Mr. Rowe: He said that is not an insurance company, your Honor. That is the differentiation that is being made.

Mr. Stanbury: No, no, that is part of the differentiation.

Mr. Rowe: I wouldn't attempt to state your whole case, Mr. Stanbury.

Q. (By Mr. Stanbury): Do you know a nickname under which the American Auto Association is known in this country?

A. They call them—they are generally known as the Triple A or Three A's.

Q. Or still another?

A. That is the only two particular names.

Q. Have you heard of AAA? A. Yes.

Q. Have you ever heard them referred to as the American Auto? [51] A. Never.

Q. Does the American Automobile Association write insurance, to your knowledge?

A. No, they do not.

Q. Or broker insurance in its own name?

(Testimony of Don R. Sessions.)

A. No.

Q. I have here a group of fifteen documents, all of which are headed "American Auto Spotlight," some of them bearing numbers; what are they?

A. Those were a series of direct mailing pieces, advertising mailing pieces, to be furnished to our agents and brokers, who in turn could send them out to their clients.

Q. And who put them out?

A. We furnished the agents and brokers with this material.

Q. By "we" you mean the plaintiff companies?

A. That's right.

Q. Over what period of time were they issued?

A. I think probably two years.

Q. And when?

A. In the middle 1930s. [52]

* * *

Mr. Stanbury: We offer this group of fifteen American Auto Spotlights as Plaintiffs' next in order.

Mr. Rowe: That is subject to the same objection, your Honor.

The Court: That is Plaintiffs' Exhibit No. 6. Let it be so marked. All exhibits of this nature, those that are similar to this, are received subject to the objection heretofore made to Plaintiffs' Exhibit 3. [53]

* * *

(Testimony of Don R. Sessions.)

(The documents referred to were marked Plaintiffs' Exhibit 6, and were received in evidence.)

Q. (By Mr. Stanbury): The next one, sir, American Auto Policyholders Digest, a small pamphlet bearing those words at the top; was that put out by the plaintiff companies? A. It was.

Q. Do you know when?

A. Approximately in the middle 1930s.

Mr. Stanbury: We will offer this as Plaintiffs' next in order.

The Court: Let it be received and marked as Plaintiffs' Exhibit 7.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 7, and was received in evidence.)

Mr. Stanbury: I don't want to take the time of the court to identify all this material, if counsel will agree to waive identification in the record I will simply identify it with a few words.

Mr. Rowe: If Mr. Sessions will state the time at which [54] these documents were furnished to the agents and the brokers, in the middle '30s or whenever it may have been, I am perfectly satisfied.

Q. (By Mr. Stanbury): Do you know how late a period this whole group of advertising ran, sir?

A. Down through 1942, I believe.

Q. All right.

(Testimony of Don R. Sessions.)

Mr. Stanbury: There are pencil notations on some of these that I did not erase. That one has got 1940 on it.

The Court: There are none of them later than 1942, are there, Mr. Sessions?

The Witness: Not to my knowledge.

Mr. Stanbury: All right. Then we will offer this group——

The Court: You offer that group, and let it be received as Plaintiffs' Exhibit 8. Just give them to the clerk and he will put them together.

Mr. Stanbury: All right.

(The documents referred to were marked Plaintiffs' Exhibit 8, and were received in evidence.) [55]

Direct Examination

(Continued)

By Mr. Stanbury:

Q. Mr. Sessions, has there been any conscious abandonment of the name American Auto by these plaintiff companies?

Mr. Rowe: I object to the word "conscious."

Mr. Stanbury: I gather the defendant claims operation of law or by circumstantial evidence of something of the kind. However, I will withdraw the question. I think it is of small moment.

The Court: I think this is a question you can ask him: if there has been any abandonment by the

(Testimony of Don R. Sessions.)

officers of the company. That is a matter within his knowledge as president of this company.

The Witness: Vice-president.

Mr. Stanbury: I called him president. I knew better. He is vice-president.

Q. (By Mr. Stanbury): You answer the question as just [56] phrased by the court.

A. No, we have not. And the current phone books——

Q. No, you don't need to elaborate.

The Court: That isn't an answer that requires an explanation, so strike out the rest of it.

Mr. Stanbury: You have seen the local phone books, have you, Mr. Rowe?

Mr. Rowe: Yes.

Q. (By Mr. Stanbury): I call your attention, Mr. Sessions, to the latest Los Angeles classified telephone directory which bears date of June, 1948. Turning to page 704 under Insurance Companies and General Agencies——

Mr. Stanbury: May I read into the record, if your Honor please, the three references?

The Court: Yes, you may.

Mr. Stanbury: In the small regular type is the following: American Associated Ins'Cos 111 W 7th. TRnity 2311. Following is a box headed in bold black capitals: "American Auto Insurance Co" within the box in three lines: "Automobile and General Casualty Insurance Day or Night call," and the next line 111 W 7th TRinty 2311, the whole of

(Testimony of Don R. Sessions.)

the latter being in capitals and enclosed in a line box. And below that in the regular type: "American Auto Insurance Co 111 W 7th. TRnity 2311."

May I, if your Honor please, ask the court to look at [57] that?

The Court: You have no objection?

Mr. Rowe: None at all. I would just like to look after you do.

The Court: Which was the last one—American Auto Insurance Company?

Mr. Stanbury: Yes; there is the box there and American——

The Court: These are all under the heading "Insurance"?

Mr. Stanbury: "Insurance Companies," yes, sir. It says "Insurance Companies, Agents and Brokers," I believe, sir.

The Court: I think it says "Insurance Agents & Brokers."

Mr. Stanbury: The heading is repeated on the very column that those listings are in, if your Honor wants to look at it.

The Court: It says "Insurance Agents & Brokers."

Mr. Rowe, you may see this now.

Mr. Rowe: Are we going to use just a page?

Mr. Stanbury: I will mutilate another book to bring in here tomorrow. That one belongs to the secretary of the judge.

The Court: Are you going to offer it in evidence?

(Testimony of Don R. Sessions.)

Mr. Stanbury: I intend to offer it in evidence, but not from this book. [58]

Mr. Rowe: You are offering the entire page? If not, I would like to offer the rest of the page from "American" to "American."

Mr. Stanbury: I think the whole page should be in.

Mr. Rowe: Are you going to use the other book, too?

Mr. Stanbury: Yes. I am just using it now. You have seen it, Mr. Rowe?

Mr. Rowe: Yes, I am familiar with the other one.

Q. (By Mr. Stanbury): Calling your attention to the regular white Los Angeles Exchange telephone directory, Central Section of the Los Angeles Extended Area, May, 1948, turning to page 33 there is the following entry to begin with: "American Associated Ins Cos 111 W 7th Day & Night call TRnity 2311." Then follows, one, two, three, four, five other entries down to the following: "American Auto Ins Co 111 W 7th Day & Night call TRnity 2311."

Mr. Stanbury: Does your Honor care to see this book?

The Court: No.

Mr. Rowe: Are you going to offer that page, Mr. Stanbury?

Mr. Stanbury: I would be glad to offer it.

Mr. Rowe: Frankly, I had in mind doing the

(Testimony of Don R. Sessions.)

same thing, your Honor, offering the page. [59]

* * *

Q. (By Mr. Stanbury): Mr. Sessions, from time to time do various insurance publications print the stock quotations of the various insurance companies operating in this country?

A. They do.

Q. I will show you the National Underwriter, issue of October 28, 1948, at page 30 the fourth column under the heading "Stocks" the entry "American Auto Dividend \$1.20, Bid 43," and under the "Asked" column the word "Bid." Is that portion of this magazine like others you have seen?

A. Yes, several publications publish those stock quotations.

Q. With reference to——

Mr. Rowe: Couldn't you give us an example? If it is the same thing in 100 auto publications I think we ought to have it.

Q. (By Mr. Stanbury): Will you state some of the publications which carry lists like this of the American Auto? [60]

A. The Insurance Journal carries the identical listing as far as the American Auto is concerned.

Q. Is that the right price on the stock of this company as of October '48?

A. I presume it is.

Q. Do you know any other company that is referred to as American Auto other than this one?

A. No, I do not.

(Testimony of Don R. Sessions.)

Mr. Stanbury: I will offer this as Plaintiffs' next in order, your Honor.

The Court: How much of it do you want to offer?

Mr. Stanbury: Merely the stock listing on page 30 of the issue identified.

The Court: Take a pencil there, Mr. Enstrom, and mark it. Let it be received as Plaintiffs' Exhibit No. 9.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 9, and was received in evidence.)

Q. (By Mr. Stanbury): This morning you stated that the 1947 premium income of the American Auto, American Automobile Insurance Company, alone was about thirty million. Have you got the exact figure now?

A. Yes, I have looked it up. It is thirty-seven million.

Q. It was thirty-seven million in 1947? [61]

A. '47, yes.

Q. And that excludes the American Auto Fire?

A. That's right.

Q. Which was—

A. Approximately five million.

Q. With reference to the various pamphlets published by these plaintiff companies and received in evidence as Exhibit 8, you stated this morning that the date of issuance ran through 1942. Have you checked that over the noon hour?

(Testimony of Don R. Sessions.)

A. Yes, I found that that runs through 1943.

Q. I don't recall asking whether these companies have been doing business in California continuously since the first of 1912?

A. We have continuously since 1912.

Q. What about Los Angeles?

A. Since 1912.

Q. And approximately how many agents do these plaintiff companies have in Southern California? A. We have about 200.

Q. What proportion of those are in Los Angeles County? A. Probably 160.

Q. Have these plaintiff companies made any effort to maintain a favorable reputation with the public with whom they deal? [62]

Mr. Rowe: Just a moment. I will object to that upon the grounds it is incompetent, irrelevant and immaterial, much too broad in its scope and its application. It is uncertain and indefinite, it calls for a conclusion.

* * *

Discussion.

The Court: I think it would be a conclusion on his part as to the question asked. You might ask him as to what things have been done looking toward that end, if you desire. [63]

Q. (By Mr. Stanbury): What if anything has been done by the plaintiff companies toward the end of establishing relations with the public?

A. We have tried to maintain the best possible claims service and the best service we can render

(Testimony of Don R. Sessions.)

in all our other departments, engineering, underwriting, and so forth.

Mr. Rowe: Just a moment. May I have an objection or motion to strike the answer? I would like to move to strike the first part of the answer that they have endeavored to maintain the best possible claims service as being purely a conclusion or a statement. It has nothing to get your fingers into.

Mr. Stanbury: I just did ask him what does he mean by service.

Mr. Rowe: It is a comparative thing, the best possible claims service. As against what claims service, and how does one measure a claims service?

Mr. Stanbury: I am just about to go into that very subject, your Honor.

The Court: Read the question and the answer. I think we are taking too much time on this particular point. This company has a business of \$37,000,000 in the United States, and it has 200 agents in Southern California. It seems to me it is a waste of time to ask him if they have endeavored to [64] build up this business if they have that here and have been in business since 1912 in California. But I did not want to tell you how to try your case, Mr. Stanbury.

Mr. Stanbury: I stipulate that the answer may be stricken, if it is agreeable with the court.

The Court: It may go out. He did say that they endeavored to maintain the best possible claims service. You can ask him do they have any claim agents and adjusters and all.

(Testimony of Don R. Sessions.)

Q. (By Mr. Stanbury): You have claim agents and adjusters, do you not, sir?

A. We have a large staff of adjusters in our local branch office.

Q. Do you know how many claim adjusters you have working out of the Los Angeles office of these plaintiff companies? A. About thirty. [65]

* * *

Q. Does the reputation of an insurance company with claimants and with assureds for service rendered have any effect upon that company's business, judging from your experience as an insurance executive?

Mr. Rowe: I will submit, your Honor, that question calls for an opinion and conclusion of this witness. He is not a salesman. As far as the record shows he has never been a salesman.

The Court: I think he is in position to answer that question. The objection is overruled. You may answer it.

A. It certainly does. A claim service of any company is all-important in that respect. [66]

* * *

Cross-Examination

By Mr. Rowe:

Q. Mr. Sessions, at the present time you have under common ownership or what is substantially common ownership four insurance companies?

A. That's right.

(Testimony of Don R. Sessions.)

Q. Those four insurance companies are the companies which are plaintiffs here, the Associated Indemnity Company, and I will have to ask you to give me the name of the other.

A. Associated Fire and Marine.

Q. When did the plaintiff companies acquire ownership and control of the Associated Indemnity Company?

A. They acquired ownership in August, 1943.

Q. And when did the plaintiff companies acquire ownership and control of the fourth company that you just named?

A. At the same time.

Q. In 1943? A. Yes.

Q. Are these four companies operated at the same place of business in each locality where your group of companies [67] has offices? A. Yes.

Q. Do the people who are employed by one company perform services for the other companies?

A. They are all employed and paid their salaries by the American Automobile Insurance Company, which is the parent company.

Q. In other words, anybody who performs any work or services for any of the four associated companies, or your group companies, is on the pay roll of American Automobile Insurance Company?

A. Yes.

Q. And I presume the officers and directors in the four companies are interlocking?

A. Not all the directors, no.

(Testimony of Don R. Sessions.)

Q. The officers? A. There are some.

Q. The officers?

A. Not all the officers, but there are some interlocking.

Q. In the main would the question be answered in the affirmative?

A. Of course the Associated is a subsidiary of the American Auto, and wholly owned by the American Auto, and some of the same directors are on both, and some of the [68] same officers, but not identical.

Q. The same is true for the Associated Fire Insurance Company? A. Yes.

Q. And the same is true for the Associated—

A. Indemnity?

Q. No. Marine.

A. Associated Fire and Marine?

Q. Yes. A. That's right.

Q. Since 1944 has your company engaged—withdraw that. Since 1944 has the American Automobile Insurance Company undertaken any advertising similar to the exhibits that have gone in evidence here this morning?

A. We have had the usual advertising in insurance trade papers, yes.

Q. Are those papers in the same form as the one you have presented here this morning?

A. In the same form? I don't understand.

Q. Have you copies of such documents?

A. I haven't them with me, no.

(Testimony of Don R. Sessions.)

Q. Can you produce them tomorrow?

A. Some recent magazines?

Q. Yes. A. Yes. [69]

* * *

Q. Will you produce such documents for me?

A. Insurance trade papers?

Q. Yes, similar to the material you have put in evidence this morning, which has been instigated or put out by your company since 1944.

A. I think I can find some. I will try to.

Q. Mr. Sessions, isn't it a fact that after, and very shortly after, the two plaintiff companies acquired the ownership and control of the Associated Indemnity and the Associated Marine, that the four companies together commenced to use the trade name American Associated Insurance Companies?

A. That's right.

Q. And isn't it a fact that under that name you have advertised since 1944? A. That's true.

Q. I have here a copy of an insurance directory which is published by Kirschner of Los Angeles. Are you familiar with this document?

A. Yes, I am. I have seen it.

Mr. Stanbury: I have one right here. [71]

Q. (By Mr. Rowe): I would like to direct your attention to page 21 of this document and ask if that is the general way in which you have advertised since 1944?

A. That's right, and listing our individual companies below.

(Testimony of Don R. Sessions.)

Mr. Rowe: I would like your Honor, if you care to, to see the type of advertisement.

The Court: Don't you think you had better offer it in evidence first?

Mr. Rowe: I will offer this page 21 from Kirschner's insurance directory, July, 1948, 47th Edition, in evidence.

The Court: Let it be received and marked as Defendant's Exhibit A.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

Q. (By Mr. Rowe): Isn't this method of advertising that is indicated in this exhibit a method of advertising which is followed by your company wherever it operates?

A. Yes, that's true today, yes.

Q. Shortly after—

The Court: Read that answer, please.

(The answer was read by the reporter.)

The Court: Has it been true since the end of 1943?

The Witness: I would say since the end of 1944, your Honor. [72]

The Court: I thought there was a statement made here regarding—did you make some statement after you came back stating that you looked over that exhibit?

Mr. Stanbury: As to these pamphlets, your Honor.

(Testimony of Don R. Sessions.)

The Court: What was that?

Mr. Stanbury: That these pamphlets stopped coming out at the end of '43.

The Court: That had nothing to do with the other exhibits?

Mr. Stanbury: No, I didn't refer to that.

The Court: That is Exhibit what?

Mr. Stanbury: Exhibit 8. This morning he said 1942.

The Court: Yes, this morning the statement was made that there were, I believe, as of November, 1944.

Mr. Stanbury: He said 1942 this morning and corrected it to '43.

The Court: What was said about 1944?

Mr. Stanbury: The magazine items go up through 1944 in Exhibit 3. In fact, they run through '46, these exhibits.

The Court: The one in 1946 I recall.

Mr. Stanbury: That's right.

The Court: Go ahead, Mr. Rowe.

Q. (By Mr. Rowe): At the time this method of advertising of your companies was instituted, will you state whether or [73] not American Associated Insurance Companies adopted an emblem of any kind in its advertising or in use on its stationery, or otherwise?

A. Yes, it was shortly after that that we did.

Q. I will show you here a letter addressed by you to Muller Brothers under date of October 22nd,

(Testimony of Don R. Sessions.)

1947, and ask you if that is the type of stationery that is in use by your company at this time.

A. It is with this emblem. However, now in our stationery we do not include American Automobile Fire Insurance Company or Associated Fire and Marine. We are listing the two companies, American Automobile and Associated Indemnity. That is the only difference.

Q. Do you still carry the middle portion "American Associated" in large letters separated by an emblem? A. We do.

Q. And under that "Insurance Companies"?

A. That's right.

Q. How long would you say that your stationery has been prepared in that form?

A. I would say since the end of 1944, perhaps.

Mr. Rowe: I will offer this in evidence, your Honor, not for the letter itself, but simply for the top portion of the letterhead which has the printed matter upon it, and ask that it be marked as Defendant's Exhibit next in order. [74]

The Court: Let it be received and marked as Defendant's Exhibit B.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit B, and was received in evidence.)

Q. (By Mr. Rowe): Mr. Sessions, in your office here in Los Angeles you have a telephone exchange?

A. That's right.

(Testimony of Don R. Sessions.)

Q. Do you know how your telephone girls answer the phone when the phone is rung?

A. I am not certain how they all do. I think some may say "American Associated," some may answer "Trinity 2311." I am not certain.

Q. But you would say they answer in either one of the two methods, "American Associated" or "Trinity 2311"?

A. I would say so, yes.

Q. You have offices in many of the cities of the country, do you not?

A. About 28 branch offices.

Q. And St. Louis, Missouri, is your home office?

A. That is our head office.

Q. I will show you here a telephone book from Greater St. Louis, which is the home office of your company, and direct your attention, first to page 246 of the classified section, and ask you if this listing here is that of your [75] company: American-Associated Insurance Companies, City Offices 112 North 4th Street?

A. Yes.

Q. Under that appears the listing of the American Automobile Insurance Company?

A. Yes.

Q. That listing has the word "American" spelled out in full?

A. Yes, it does.

Q. The word "Automobile" spelled out in full?

A. Yes.

Q. The word "Insurance" abbreviated "I-n-s"?

A. Yes.

(Testimony of Don R. Sessions.)

Q. And the word "Company" abbreviated "C-o"? A. Yes.

Q. And that is in the classified part of this directory? A. I will take your word for it.

Q. Here it is. Directing your attention to page 19, which is the alphabetical portion of this same directory, I will ask you to look at this listing American Automobile Insurance Company, which is listed in this fashion: the word "American" abbreviated to A-m-e-r, the word "Automobile" spelled out in full, the word "Insurance" abbreviated to "I-n-s," and the word "Company" abbreviated as "C-o," That [76] is your listing and that is your number, is that correct? A. That is correct.

Mr. Rowe: Your Honor, I can tear these pages if you like.

The Court: Unless you require it, or Mr. Stanbury does——

Mr. Stanbury: I don't, your Honor, not at all.

Mr. Rowe: I think I would like to offer the full page from American to American in both classified and alphabetical, and I will extract them from here, if I may do so, and I will ask that those two pages be offered as Defendant's Exhibit next in order.

The Court: When they are properly presented they may be received and marked together as Defendant's Exhibit C.

The Clerk: So marked.

(The documents referred to were marked Defendant's Exhibit C, and were received in evidence.)

(Testimony of Don R. Sessions.)

Q. (By Mr. Rowe): Do you have offices in Washington, D. C.?

A. We have no branch there. We might have a service office, I don't know.

Q. I will show you here——

Mr. Stanbury: If your Honor please, I am objecting to anything as far afield as Washington, D. C. I didn't object to St. Louis, as it is the home office, but I don't understand that this defendant intends to do business in Washington, [77] D. C. It is a Southern California matter.

Mr. Rowe: We are dealing here, your Honor, with what I understand to be are two companies who are qualified to transact business in every state of the United States. The claim is made they are holding on to the words "American Auto" by reason of the fact, one fact among others, that there is a listing in the Los Angeles telephone book in that manner. I think we are entitled to show, as far as we have been able to find this company, the manner in which it is listed, and I have, frankly, about ten cities that I have gotten directories of, and I want to show your Honor how the listings are in those cities.

Mr. Stanbury: I don't know what city might become material, such as Pasadena or Long Beach or——

Mr. Rowe: These are not.

Mr. Stanbury (Continuing): ——or close by here, but Washington, D. C., I submit, is too re-

(Testimony of Don R. Sessions.)

mote to affect in any way any issue in this case.

Mr. Rowe: A trade name is not confined to a district where a corporation is operating on a national scale. It is either a trade name nationally or it isn't a trade name.

Mr. Stanbury: If your Honor please, we are not contending a trade name at all; we are contending secondary meaning.

Mr. Rowe: It is the same thing. [78]

Mr. Stanbury: It is very different. In the present use of it it may make no difference in the way counsel means it.

Mr. Rowe: I don't mean a registered trademark.

Mr. Stanbury: If counsel uses the word "trade name" in its technical significance, I want him to know at this time that we are not contending any trade name. I submit the question here is whether or not there is any interference with the operations of these plaintiff companies by the proposed business of the defendant in this locality where the defendant proposes to operate. And in that connection it is true we have only produced 1948 phone books, but I should go back——

Mr. Rowe: I have the men here who will testify——

The Court: I wish you gentlemen would speak one at a time. Mr. Goldstein is an excellent reporter, but he can't take down the speeches of two persons at the same time.

(Testimony of Don R. Sessions.)

Mr. Stanbury: We will show in this locality these companies have been listed as shown in these books before this law suit or the American Auto Club was ever heard of in this locality, and I submit that is the question.

Mr. Rowe: May I say one word in reply? I think your Honor will recall that during the course of the plaintiff's evidence proof was put in of publication in insurance journals in several cities throughout the United States indicating [79] that at least on that issue plaintiff was not as confined in his thinking as it is on this issue, and we think that the trade name——

The Court: It seems to the court that it is proper evidence to rebut the inference that might be drawn from the other testimony, but if there is no question about this, perhaps you might stipulate to it and save the time.

Mr. Stanbury: If I was shown the books I, of course, will stipulate immediately to what it shows.

Mr. Rowe: It is about time for the 3:00 o'clock recess. Would your Honor like to adjourn for a moment so he can look at them? We have about ten.

The Court: If we can save time by a short recess.

Mr. Rowe: While Mr. Stanbury is looking at one, if I may call particular attention to this one from Washington, D. C.——

The Court: You had better wait. He has to conduct this case.

(Testimony of Don R. Sessions.)

Mr. Stanbury: I will look at it now.

(Slight delay in proceedings.)

Mr. Rowe: I will offer this book in evidence, if I may, as Defendant's Exhibit next in order. That is page 382 of the classified list of the Washington telephone directory, and ask that it be received in evidence and marked Defendant's Exhibit next in order. [80]

The Court: Let it be received and marked as Defendant's Exhibit D.

(The book referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. Rowe: I would like to call your Honor's attention, if I may, to the listing. The first listing, American Associated Insurance Companies, the words American-Associated being hyphenated, immediately followed by American Automobile Insurance Company, with each word spelled out in full, and that is immediately followed by American Automobile Insurance Company of St. Louis, and in the advertising the emblem which appears on the stationery that I just introduced in evidence—and that emblem, by the way, Mr. Stanbury, or the letters on there A.A.I.C., stand for American-Associated Insurance Companies, isn't that correct?

The Witness: It does for that, and could also stand for American Automobile Insurance Company, the same letters.

Q. (By Mr. Rowe): Isn't it designed to stand

(Testimony of Don R. Sessions.)

for the four as your Associated Insurance Company emblem?

A. Yes, I think that is a fair statement. [81]

* * *

Mr. Rowe: May it please the court, I think Mr. Stanbury and I are prepared to stipulate as follows: In each of the telephone books which I will shortly identify the plaintiff company is listed as American Automobile Insurance Company. In some instances with the word "American" abbreviated to "A-m-e-r," in other instances the word "Insurance" is abbreviated to "I-n-s," and the word "Company" to "C-o." In no instance is the word "Automobile" abbreviated. Is that correct?

Mr. Stanbury: So stipulated.

Mr. Rowe: I have, your Honor, torn the pages from these various books and I would like to introduce the entire pages that I have torn for the purposes of carrying out the stipulation as well as for the purpose of indicating the great number of other concerns which have as a part of their name the word "American," and in some instances concerns which have "American Auto" as parts of these names.

Mr. Stanbury: If your Honor please, I have no objection to these pages going in for the purpose stated, although I submit that reading it in the record is enough. When counsel says there are other concerns here——

Mr. Rowe: I have here—— [82]

(Testimony of Don R. Sessions.)

Mr. Stanbury: I know, it says American Auto Body and Radiator Service on Fairmount Avenue in Philadelphia, I submit that is not material to this law suit, and I haven't—

The Court: I don't suppose you care about anything that doesn't have to do with insurance, do you?

Mr. Rowe: I think in an instance of this kind that we are not confined solely to insurance, no.

The Court: Of course, it is a matter of common knowledge, it is one of which the court will take judicial notice, that there are many concerns that use the word "American."

Mr. Stanbury: Certainly.

The Court: Of almost every industry.

Mr. Rowe: And in some of these books, your Honor, there are concerns which use the word "American" coupled with the word "Auto," such as the case in Los Angles.

The Court: If that is the case, I think it is proper. But when it comes to "American Radiator" or "American Brick" or "American Bakeries," I don't think that would serve any purpose.

Mr. Rowe: The exhibits have been cut down to pages like that. I have torn them from the book.

The Court: If there is an objection to the use of any of these other names of American generally, I think that objection is good. Anything that has to do with "Automobile" or "Insurance," I think that is proper. [83]

(Testimony of Don R. Sessions.)

Mr. Rowe: I don't want to argue at this point.

The Court: You don't need to, as far as that is concerned.

Mr. Rowe: May I just make a short statement?

The Court: Yes.

Mr. Rowe: I think Mr. Stanbury will rely upon cases which have to do with the problem that competition is not essential in a name case, and therefore I think the companies which have the same name that are in non-competitive businesses are a material factor in the case. His trial brief indicates that.

Mr. Stanbury: That is true, competition isn't necessary, but there is to be no effort to enjoin an American Body and Radiator Service. I haven't looked at this with eyes aimed at this point at all, but my objection is that the fact that there is an American Auto Body and Radiator Service on Fairmount Avenue in Philadelphia is completely immaterial.

The Court: I think it is, too, and that will be the ruling of the court.

If you desire to offer it as limited, and you have made your statement, Mr. Rowe, I think it is sufficient, the court will receive it.

Mr. Rowe: As I understand it, the offer will, by reason of the ruling of the court, be limited to the listing of the [84] plaintiff companies or one of its associated companies; is that correct?

The Court: No, no. Anything that has to do

(Testimony of Don R. Sessions.)

with the use of the word "American" and "Automobile," except Body and Fender. I don't think that should go in. But I think anything that has to do with insurance business of any type is proper.

Mr. Rowe: Then I will offer it along the lines that your Honor suggested.

Mr. Stanbury: If there is such, I wish to know about it now, your Honor, because I didn't know about this angle of it at all, and if counsel has in mind any insurance concern that has "American Auto" in it, I ask that it be pointed out to me now so that we can investigate it.

Mr. Rowe: I have none in this book, nor do I know of any in the books which will follow.

Mr. Stanbury: All right, then. That is satisfactory.

Mr. Rowe: Then I will offer at this time, your Honor, as Defendant's Exhibit next in order, pages No. 23, 24, 25 and 26, consisting actually of two pages from the Philadelphia phone directory dated May, 1948.

Mr. Stanbury: If your Honor please, I thought that our stipulation was broad enough to avoid cluttering up the record with these exhibits. It may be confusing later on. I stipulated to the whole substance of all of them. [85]

The Court: I see no purpose in offering this if your stipulation covers it, Mr. Rowe.

Mr. Rowe: Our stipulation, as I understood it—

(Testimony of Don R. Sessions.)

The Court: You stated you wanted to offer it to support the stipulation. You don't need to support a stipulation by evidence.

Mr. Rowe: I can see that. The point is the stipulation obviates the necessity of pointing out the particular listing or how it is listed. I thought we were saving time in that fashion. I did not intend to limit myself to an exclusion of the names of various concerns starting with the word "American." I think that is material to the case. If your Honor will not permit——

The Court: Do you think American Bank Equipment Company——

Mr. Rowe: Only as indicating a universal use of the word "American" in almost every kind of industry.

The Court: That is a matter of which the court will take judicial notice. You don't have to support it by proof.

Mr. Rowe: If your Honor will take judicial notice of all these matters——

The Court: I don't take judicial notice of all matters, but I take judicial notice of the fact that the word "American" is used in a variety of businesses, industries. [86] Take, for exemple, here there are pages of them in this one directory.

Mr. Rowe: That is correct.

The Court: I don't think the court should have to take the time on that.

There is a case in 180 Cal., about the leading

(Testimony of Don R. Sessions.)

case in regard to the matter of judicial notice in the State of California, *Varcoe v. Lee*, where matters are of such common knowledge in the community as the use of the word "American" in industrial and business operations, the court is compelled to recognize that and to take judicial notice of that. That is *Varcoe v. Lee*, 180 Cal.

Another case is *People v. Tossetti*, I think that is in 107 Cal. App., at page 7. And there are numbers of cases along that line; almost as innumerable are the cases as the use of the word "American" on these pages you have presented.

Mr. Rowe: It may be an overabundance of caution. I found in some cases that I have read proof was made of matters such as I am trying to get in evidence in the manner I am attempting to do it, and I felt that should be done.

The Court: I think it will appear in the record from the statements made here that there are several columns on these pages that you have offered here of closely written printed matter where the concerns listed begin with the word "American."

Mr. Rowe: I would also like to have in the record, if [87] your Honor deems it proper, the two or three listings there that carry the words "American Auto," with the word "Auto" abbreviated, or at least put in that form.

The Court: I think that is proper, "American Auto Association."

Mr. Rowe: Yes.

(Testimony of Don R. Sessions.)

The Court: And just above that "American Auto Body & Radiator Service," there is the abbreviation.

Mr. Rowe: And just below it are two or three.

The Court: And American Auto Publication, American Auto Radiator, American Automobile Touring Alliance, and there are numbers of them——

Mr. Rowe: Those are the ones I was particularly anxious to get in the record, so those will be made a part of the record, your Honor.

The Court: They may be made. They have been read into the record. Anything that has been read into the record you don't need to offer exhibits regarding them.

Mr. Rowe: In line with what your Honor has just said, and reading from page 13 of the Pacific Telephone directory dated July, 1948, I would like to call attention to the following listings: American Automatic Typewriter Company, American Auto Crematory, American Auto Fabric Co., the plaintiff company Amer, A-m-e-r, "Automobile" spelled out, Ins Co, Amer Auto Repair Co. [88]

From page 13 of the Baltimore Telephone directory under date of September, 1948——

Mr. Stanbury: Go ahead and read them, Mr. Rowe.

Mr. Rowe: I call attention to the following listings: American Auto Parts Co., American Auto Repair Service, American Automobile Association, abbreviated.

(Testimony of Don R. Sessions.)

Our stipulation that we have made applies likewise to the Minneapolis telephone directory. I would like to call attention to: American Automobile Association, with the word "Association" abbreviated, American Auto Body Repairing Co., with "Repairing" abbreviated, American Auto Parts Co., with "American" abbreviated down to the two letters "A-m."

In the San Francisco directory of May, 1948: American Automobile Association, with the word "American" abbreviated "A-m-e-r." The same abbreviation for "American Automobile Driving School." The same abbreviation for the two plaintiff companies.

From the Detroit Telephone directory dated December, 1948 the following listings: American Auto Appraisal, with the word "American" abbreviated A-m-e-r. That abbreviation is the same in each one that I will read. American Auto Felt Corporation, American Auto Parts and Fender Co., American Auto Sales, American Auto Service Co., American Automobile Dealers Association, American Automobile, The followed by [89] P-b-n, which I assume means publication.

Q. (By Mr. Rowe): Mr. Sessions, in selling the policies of insurance which your companies issue, the sales to the public or to the assureds are made entirely through licensed agents and brokers, are they not?

A. That is correct.

(Testimony of Don R. Sessions.)

Q. Do you in your operations work with any automobile clubs as far as discounts on premiums are concerned, or things of that sort?

A. Yes, all stock casualty companies do give discounts for a certain club.

Q. Will you tell me the names of some of the clubs?

A. There is only one club that I know of, and it is owned by the Board of fire companies, the National Automobile Club.

Q. The National Automobile Club?

A. Yes.

Q. Does your company own any stock in that concern? A. None at all, no, sir.

Q. It does not? A. No. [90]

* * *

Q. (By Mr. Rowe): Mr. Sessions, there has just been handed me an Insurance Journal of July, 1948; is that the same publication, earlier copies of which were introduced in evidence this morning through your testimony?

A. It is.

Q. Directing your attention to the inside of the first page or cover page of that Journal, which bears date, by the way, of July, 1948, is the inside an advertisement inserted by the plaintiff companies of the American Associated Insurance Companies? A. It is.

Mr. Rowe: I will ask that the cover page be ad-

(Testimony of Don R. Sessions.)

mitted in evidence and marked Defendant's Exhibit next in order.

The Court: It may be received in evidence. I am not sure, Mr. Rowe, whether that is the cover page or whether that is the inside of the cover page.

Mr. Rowe: The inside of the cover page, your Honor.

The Court: Let it be received and marked as Defendant's [93] Exhibit E.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit E, and was received in evidence.)

Q. (By Mr. Rowe): Referring now, Mr. Sessions, to Defendant's Exhibit E, may I ask if you know how long the American Associated Insurance Companies have been advertising in the Insurance Journal in the manner indicated by this last exhibit, or in some similar manner?

A. By "manner" what do you mean?

Q. The set-up of the ad.

A. The present trade-mark there or emblem?

Q. Yes, the present trade-mark under which your companies operate.

A. It is an emblem, and with those names that would be since about 1944, I should say.

Q. And—— A. End of 1944.

Q. Since 1944, where this emblem that you refer to and the names American Associated Insurance

(Testimony of Don R. Sessions.)

Companies have appeared, the actual names of the company appeared at some other point in the advertisement with each word of the name spelled out completely, is that correct?

A. I believe it is.

Q. And that has been since 1944? [94]

A. Yes.

Q. Mr. Sessions, directing your attention to the column or lower half-column headed "Stocks" appearing on page 30 of the National Underwriter, which is Plaintiffs' Exhibit No. 9, I would like to ask you whether or not you are familiar with the manner in which companies are named in stock quotations, both in newspapers and in other journals wherein stock quotations are published?

A. I only know what I see here.

Q. You are not familiar at all with the manner in which stock quotations are published in the daily newspapers, for example?

A. Yes, I see them occasionally there.

Q. Have you ever seen them in the Wall Street Journal?

A. I don't take the Wall Street Journal.

Q. Have you ever examined a copy of the Wall Street Journal?

A. I have seen a copy years ago.

Q. Have you ever examined the stock quotations in the Wall Street Journal?

A. Not for years.

Q. Isn't it a fact, to your knowledge, that it is

(Testimony of Don R. Sessions.)

customary in giving stock quotations to abbreviate a name almost to the shortest possible point—withdraw the latter part—to abbreviate the name of the listed company? [95]

Mr. Stanbury: I will stipulate to that if it will save time, Mr. Rowe.

Q. (By Mr. Rowe): May I ask if you are suggesting that this abbreviation flows from the American Automobile Insurance Company, or from the abbreviation of the publisher?

A. I don't know.

Q. You at no time have ever requested the publisher of that publication to either list your stock in such a quotation or to abbreviate it in any particular manner?

A. That material is published in Chicago, and I have no dealings with it personally.

Mr. Rowe: That is all. [96]

* * *

WILLIAM E. WELSH

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. What is your occupation?

A. Insurance agent.

Q. How long have you been an insurance agent?

A. About 27 years.

(Testimony of William E. Welsh.)

Q. Have you had for many years past a rather close connection with the insurance business in this county? A. Yes, sir.

Q. Are you a past president of the National Association of Insurance Agents?

A. Yes, sir.

Q. And a past president of the California Association of Insurance Agents? [97]

A. Yes, sir.

Q. And I understand you are in business—you have your own office here, have you not?

A. Yes, sir.

Q. It is located in Pasadena? A. Yes, sir.

Q. That is, you are in business for yourself?

A. Yes, sir.

Q. You are an accredited agent of the American Auto and American Automobile Fire Insurance Companies? A. Yes, sir.

Q. For how long have you been?

A. About 21 years.

Q. Have you had occasion during that time to talk to people, to the public—let us take it up separately. Have you had occasion to talk to people engaged in the insurance business about these plaintiff companies? A. Yes, sir.

Q. Have you had occasion to talk to members of the public concerning these plaintiff companies?

A. Yes, sir.

Q. By what manner or means would you be talking to members of the public about the plaintiff companies?

(Testimony of William E. Welsh.)

A. About purchasing a contract of insurance.

Q. Can you tell us whether or not there is any nickname [98] of these plaintiff companies that is in common usage in this county? A. Yes, sir.

Q. What is it? A. American Auto.

Q. Have you heard of any other organization of any kind, whether the Triple A or anything else, referred to as the American Auto?

A. No, sir.

Q. Have you ever heard the American Automobile Association referred to as the American Auto or American Automobile?

A. I don't recall it.

* * *

Q. Do you recall when the American Automobile Insurance Company purchased the Associated Indemnity and the Associated Indemnity Fire and Marine, or Associated Fire and Marine Company?

A. Yes, sir. [99]

* * *

Q. How often do you have occasion to speak of these plaintiff companies nowadays in the course of your business?

A pretty regularly.

Q. What do you mean by pretty regularly?

A. Well, about 65 per cent of my business is American Automobile Insurance policies. Naturally during the course of the day that name American Auto is referred to dozens and dozens of times.

Q. All right. Now, let's take it up one thing at

(Testimony of William E. Welsh.)

a time here. You have office associates, I presume?

A. Yes, sir.

Q. How do you and your office associates among yourselves refer to these plaintiff companies nowadays? A. American Auto.

Q. Have you stopped calling it American Auto since the merger with the Associated?

A. No, sir.

Q. Do you ever refer to it in conversation as American Associated Company, nowadays?

A. No, sir.

Q. When you are talking to assureds, in what manner does the name of the company ever come up when you are [100] talking to an assured?

A. To the best of my knowledge, American Auto. It has been so long familiar with me.

Q. What brings it up, how do you happen to be talking to a member of the public about these companies?

A. They ask me the name of the company they are going to place their automobile insurance in, or they wish to discuss something about the company that I am placing their business with.

Q. Do you ever recall having heard anybody refer to these plaintiff companies as American Associated? A. Very rarely.

Q. From your experience in the insurance business are there any companies designated by the simple words "American Auto"? A. No.

Q. Are there any companies connoted or denoted

(Testimony of William E. Welsh.)

by the words "American Auto" from your experience? A. Not that I know of.

Q. How do you connote or denote these plaintiff companies? A. American Auto. [101]

* * *

Q. Are you familiar with the claim service rendered by this company during your association with it? A. Very.

Q. Are you familiar with the service rendered by this company to its assureds during the time you have been associated with it? A. Yes, sir.

Q. If an insured of these plaintiff companies has purchased a policy through you and has a claim to make against the company under a collision or fire policy, or a claim against him by some third party, do they ever come through you after their accident before dealing with the plaintiff companies? A. Almost always.

Q. That is the usual routine?

A. Yes, sir. [102]

* * *

Q. Does the American Automobile Insurance Company and American Automobile and Fire Insurance Company, do they have a reputation good or bad in this community, based upon your knowledge, from your experience, in their claim policy?

A. Good.

Mr. Rowe: I move to strike the answer.

The Court: Let the answer go out. It was a premature answer.

(Testimony of William E. Welsh.)

Q. (By Mr. Stanbury): I ask if it does have a reputation. [104]

The Court: Just answer it yes or no.

A. Yes.

Q. (By Mr. Stanbury): What is that reputation?

Mr. Rowe: Just a moment. I will object to that question on the ground there is no proper foundation laid.

The Court: Yes, I think that objection is good. I think you should lay a better foundation.

Mr. Stanbury: All right, sir.

Q. (By Mr. Stanbury): How many assureds do you have insured in the American Auto right now? A. Approximately 1500.

Q. All right. How long have you had a thousand or more people, clients of yours, insured in the American Auto? A. At least ten years.

Q. During the course of those ten years to what extent have your assureds had occasion to present claims of some kind, either in their own behalf or against them? A. It is pretty hard to say.

Q. Is it an occurrence once a month, once a year, or what? A. Each assured?

Q. No. Over all. In other words, how many claims involving assureds of the American Auto, either as the objects of a claim or the claimant, would you say you handle [105] in the course of a year?

A. I would judge between a thousand and twelve hundred claims a year.

(Testimony of William E. Welsh.)

The Court: Do you mean there are that many claims against them?

The Witness: Presented to us.

Q. (By Mr. Stanbury): Do you mean every assured has a claim?

A. Some have more than one.

The Court: They run an average of one——

The Witness: He asked me, and I said approximately 1500 clients, and I would say during the year we would take somewhere around a thousand applications for losses a year.

Q. (By Mr. Stanbury): You are talking about fender damages and everything else?

A. All kinds of automobile losses.

Mr. Stanbury: I have no further questions, sir. Thank you.

Cross-Examination

By Mr. Rowe:

Q. Mr. Welsh, you have been in the insurance agency business, you say, for about 27 years?

A. About that, sir.

Q. And for at least 20 years of that time you have been an agent of either one or both of the plaintiff companies? [106]

A. Yes, sir.

Q. About 65 per cent of your business is done with those companies? A. Yes, sir.

Q. What other companies do you represent?

A. Insurance Company of North America, Northern Insurance Company of New York, Ameri-

(Testimony of William E. Welsh.)

can Insurance Company of Newark, Fidelity & Deposit, London, Liverpool, and London and Lancashire.

Q. In placing insurance in these various companies, may I ask if the selection of the company in the ordinary case is left to you?

A. Yes, sir.

Q. In other words, a person is a client of yours whom you serve in the insurance field, is that correct? A. Yes, sir.

Q. And you yourself are in the nature of a professional man in that field? A. I hope so.

Q. That is, you regard yourself as such?

A. Yes, sir.

Q. And you yourself are familiar with the many insurance companies which are operating in California the casualty and other insurance fields?

A. Yes, sir. [107]

Q. You have known these plaintiff companies for a great number of years? A. Yes, sir.

Q. There is nothing that confuses you about the American Auto Club, is there?

A. Yes, sir.

Q. What?

A. We undoubtedly would get call after call on our telephone system regarding—

Mr. Rowe: I didn't ask that. I ask that the answer go out.

Q. (By Mr. Rowe): I am talking about you, Mr. Welsh, you have known these two companies for about 20 years—

(Testimony of William E. Welsh.)

A. I beg your pardon. I misunderstood the question.

Q. There is nothing that would confuse you as an individual? A. I don't think so.

Q. Or as an insurance broker?

A. I don't think so.

Q. You have been in it so long and you know so much about it that your knowledge takes you beyond the realm of confusion, isn't that true?

A. I think so.

Q. Isn't that generally true of other experienced insurance brokers? [108]

A. I couldn't answer that.

Mr. Rowe: I have no further questions.

WILLIAM B. GLASSICK,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. Glassick, you also are an insurance agent, are you not, sir? A. Yes, sir.

Q. You have your own business that you operate in Hollywood, I believe?

A. That's right.

Q. How long have you been an insurance agent?

A. Since 1924.

Q. Have you held any office in the Association of Insurance Agents? A. I have.

(Testimony of William B. Glassick.)

Q. What office, sir?

A. I have been president of the Insurance Association of Los Angeles, and also president of the California Association [109] of Insurance Agents.

Q. Have you had occasion in your business to talk to people about these plaintiff companies?

A. We have.

Q. Can you tell us whether or not there is any common designation or nickname by which these companies are referred to?

A. Well, among——

Mr. Rowe: Just a moment. I will object to that question on the ground it is too general. I think we are entitled to know what persons he is talking to, whether he is talking to insurance men, as the other man was, or to whom he was talking.

Mr. Stanbury: I will tell you what I will do, your Honor. This is a most unusual thought. To save a lot of time here—and I realize it will take a stipulation to do it, but I am willing to throw this case into the telephone directory and let somebody pick out every sixth name among the brokers, and call up and ask, “Is there an outfit in this town known as American Auto, and who is it?”

Mr. Rowe: I will tell you, if you will give some consideration to this type of stipulation I might go along with you. Let’s have the clerk stop every sixth man who comes down the corridor and ask him if he knows, if he owns an automobile, and if he answers in the affirmative to ask [110] him if he

(Testimony of William B. Glassick.)

knows what company carries his automobile insurance.

Mr. Stanbury: I don't know about that.

Mr. Rowe: Ask him that. You are talking about good will of the company.

The Court: Apparently these proffered stipulations aren't going to save any time.

I think the question is too general, Mr. Stanbury.

Mr. Stanbury: All right, sir.

Q. (By Mr. Stanbury): With whom do you ever have occasion to refer to either of these two plaintiff companies?

A. Our staff and the clients with whom we do business.

Q. And the clients with whom you do business would be who?

A. They would be policyholders in the American Auto.

Q. Let's take it up one thing at a time. Your staff around the office, is there any designation by which these plaintiff companies are habitually referred to?

The Court: Answer that yes or no.

A. Yes.

Q. (By Mr. Stanbury): What is it?

A. American Auto.

Q. In talking to assureds is there any common term applied to these plaintiff companies?

A. Yes. [111]

Mr. Rowe: By the assureds?

(Testimony of William B. Glassick.)

Q. (By Mr. Stanbury): By the assureds, who ever mentions the company——

The Court: I think it is a compound question.

Mr. Stanbury: All right.

Q. (By Mr. Stanbury): Have you had occasion to talk to assureds yourself? A. Yes.

Q. All right. So far as you personally are concerned, when you refer to these plaintiff companies, is there any designation which you use?

A. There is.

Q. What is it? A. American Auto.

Q. Have you had occasion to hear assured refer to these companies? A. Yes, we have.

Q. Can you tell us whether there is any common designation generally used by lay people who refer to the companies? A. Yes.

Q. What is it? A. American Auto.

Q. Do you know of any other concern that is referred to as American Auto, sir, besides these plaintiff companies? [112] A. No. I do not.

Q. Have you ever heard the American Automobile Association referred to as American Auto or American Automobile? A. No.

Q. Do you recall when the American Automobile Insurance Company bought the Associated Companies? A. I do.

Q. Have you since that time heard any general usage of the term "American Associated" in referring to these companies in conversation?

A. I have not.

(Testimony of William B. Glassick.)

Q. Can you tell us whether or not at this time these companies are still referred to as American Auto by those persons whom you have generally designated in your previous answers here.

A. Yes, sir.

Mr. Stanbury: Cross-examine.

Cross-Examination

By Mr. Rowe:

Q. Have you called the offices of these plaintiff companies lately? A. Yes, sir.

Q. How is the telephone answered?

A. I think sometimes they answer it "American Associated" and sometimes "Trinity 2311."

Q. They never answer "American Auto" and haven't for a number of years, have they?

A. I don't believe they have.

Q. In dealing with your clients—I assume you are an independent agent, is that correct?

A. That's right.

Q. And you represent a number of companies?

A. That's right.

Q. You have a clientele that consists of individuals, companies and corporations, is that correct?

A. That is correct.

Q. When a person consults you about buying automobile insurance could you tell me what per cent of the people leave it to you to designate the company in which the insurance is to be placed?

Mr. Stanbury: That is objected to as not proper cross-examination, your Honor.

(Testimony of William B. Glassick.)

The Court: It seems to the court that it isn't proper cross-examination.

Mr. Rowe: Your Honor, this is the point, if I might just explain it before you make a final ruling on it. You have in this particular type of case—and I have the authorities which will substantiate the proposition—a completely different situation than you have with a person [114] who goes into the store and buys a can of beans from a counter by reference to a trade name. I could probably make my point more clearly if you will just let me read from a case.

I might preface a reading of portions of this with a statement that this case on its facts is the closest to the instant litigation of any that has come to my attention.

This is a suit by Standard Accident Insurance Company against Standard Surety and Casualty Company of New York. It is reported in 53. Fed. 2d at page 119, and it is a decision of Frank J. Coleman, District Judge. The opinion commences:

(Portions of opinion read.)

The Court: We will hear what Mr. Stanbury has to say.

Mr. Stanbury: I submit this argument is nothing but an argument out of place and has no bearing on the objection—

The Court: I think it does with regard to the particular question, Mr. Stanbury. The question

(Testimony of William B. Glassick.)

was whether the person who takes out the policy of this type of insurance would care in what company it was placed. There is something in there. Mr. Rowe continued to read after that. It goes to show the value of presenting in advance the authority so the court may know your position without having to take the time.

Mr. Rowe: I thought it was a good opportunity for me to acquaint your Honor with this.

Mr. Stanbury: Seventy-eight volumes later, in 103 Fed. (2d) the Aetna Casualty & Surety Company was allowed to enjoin the Aetna Auto Finance Company from the use of its nickname "Aetna Auto," which, if I may use the colloquial expression, is a ringer case for the one we have before us.

(Discussion)

* * *

The Court: The objection is overruled. Read the question.

(The question referred to was read by the reporter as follows: "When a person consults you about buying automobile insurance, could you tell me what per cent of the people leave it to you to designate the company in which the insurance is to be placed?")

The Witness: It is a little difficult to say what per cent. Clients that are well known to the office would undoubtedly leave it to our judgment. However, there are people who are new to us or new to

(Testimony of William B. Glassick.)

the office that will frequently ask, "What company are you going to place the insurance in?" and then we would name the company, and many times they select the American Auto.

Q. (By Mr. Rowe): Can you give me an idea of how frequently such an occasion as that will occur in your business? I presume you interview a number of people either a day or month, don't you?

A. Yes, either I or the staff.

Q. Would you say that would occur in more than one, [125] two, three, four, five per cent of the instances?

A. In which they ask the name of the company?

Q. That's right.

A. Yes, I would say it would occur more than that. It probably would happen, possibly, eight or ten times a month.

Q. Eight or ten times a month? A. Yes.

Q. And how many policies do you place a month?

A. Do you mean all policies?

Q. Yes. A. About 500.

Q. The fact of the matter is, is it not, that an insurance agent such as you are in selling insurance to the public sells it as a result of his good will, rather than any good will of the insurance company?

Mr. Stanbury: That is objected to as not proper cross-examination, your Honor, wholly outside anything this witness was asked. I am deprived of the opportunity to cross-examine and the defendant is given a free cross-examination of a witness who

(Testimony of William B. Glassick.)

hasn't said anything on this subject whatever.

Mr. Rowe: I will withdraw the question.

Q. (By Mr. Rowe): Did I ask you how many companies you have in your office?

A. No, you didn't. [126]

Q. Will you tell me?

A. I would say probably about 15.

Q. Are they all casualty, or do you have all kinds?

A. All lines, fire, casualty, inland marine.

The Court: No life insurance?

The Witness: Yes, life insurance, too.

The Court: These answers that you were giving referred to the others, to the exclusion of life insurance?

The Witness: Yes, sir.

The Court: You didn't include life insurance?

The Witness: I did not include life insurance.

Q. (By Mr. Rowe): You have, I presume, a list of clients that you have developed over a period of time? A. That's right.

Q. Under your agency agreement with the plaintiff companies, if you have such an agreement—I perhaps first should ask do you have an agency agreement with the plaintiff company?

A. We do.

Q. You don't happen to have a copy of it with you, do you? A. No, I do not. [127]

MARK A. WELLS

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. What is your occupation, Mr. Wells?

A. I am editor and publisher of the Insurance Journal.

Q. That is this magazine of which several copies are introduced as Exhibit 3 here?

A. That's right.

Q. How long have you been in the insurance publication business? [128]

A. Approximately 21 years.

Q. Continuously? A. Continuously.

Q. Your office is where?

A. At 704 South Spring Street, Los Angeles.

Q. Have you been in Los Angeles in this business during the whole of that 21 years?

A. That entire time.

Q. And during that time have you had occasion to speak of these plaintiff companies to people?

A. Many times.

Q. Have you had occasion to have people speak of these companies to you? A. Many times.

Q. Under what circumstances, sir?

A. Virtually every imaginable circumstance pertaining to the business of insurance. Editorially when the question developed in the news; references

(Testimony of Mark A. Wells.)

to the paper, inquiries from assureds; anything that might come within the realm of the business itself.

Q. And I assume you have had occasion to talk, likewise, about many other insurance companies?

A. Many.

Q. All right. Is there any common designation or nickname by which these plaintiffs are commonly referred to? [129]

A. Do you mean today?

Q. Yes. A. The American Auto.

Q. Your answer is there is? A. There is.

Q. What is it? A. American Auto.

Q. Do you recall that the American Auto bought the Associated Companies here a few years ago?

A. Yes, I recall.

Q. Have you heard any remarks or conversation referring to these plaintiffs as American Associates in conversation? A. Yes.

Q. All right. To what extent?

A. When speaking of the entire group's operations, that is, the wide field of the business as the group does it entirely; but not as to specifically the particular fields that each particular company specializes in.

Q. All right. Has the term "American Associated" acquired any common usage that you have been able to ascertain?

Mr. Rowe: Just a moment. I will object to that upon the ground it calls for the opinion and conclusion of the witness. [130]

(Testimony of Mark A. Wells.)

The Court: I think so, Mr. Stanbury. I think you had better ask with regard to the insurance field, and then as to others if you desire.

Mr. Stanbury: All right. I will get at it this way:

Q. (By Mr. Stanbury): Since the acquisition of the Associated Companies by the American Auto has the term "American Auto" gone out of use in conversation either among insurance people or lay people who know of the companies at all, as far as you know?

Mr. Rowe: I object to it on the ground it calls for hearsay. A. Not that I know.

The Court: What is the objection?

(The objection was read by the reporter.)

Mr. Rowe: I move the answer be stricken.

The Court: It may go out. [131]

. * * *

Q. Within the insurance industry itself, Mr. Wells, can you tell us whether or not at the present time the plaintiff companies are commonly referred to as "American Auto" or something else?

A. American Auto.

Q. To what extent have you had any occasion, let us say within the last year, to ever hear any lay person outside the industry say anything about these plaintiff companies, if you have?

A. I don't recall any specific time within the realms of my capacity in the business. I have had

(Testimony of Mark A. Wells.)

the name of the company referred to in my private life, let's say, and the question asked of me as to what my opinion was of that particular company.

Q. As an insurance editor do people talk to you, lay people, talk to you about your opinion of different [132] insurance companies?

A. Quite frequently.

Q. Can you tell us whether or not people who speak to you in that connection do or do not have any general way of referring to these plaintiff companies?

A. It could be either American Auto or American Automobile.

Mr. Rowe: Just a moment. I think that calls for a yes or no answer.

The Court: I think the answer really shows he is really not qualified to answer the question generally, Mr. Stanbury.

Mr. Stanbury: All right.

Q. (By Mr. Stanbury): Is there any other company or companies that you ever heard of referred to as American Auto? A. No.

Q. Have you ever heard of the American Automobile Association referred to as American Auto or American Automobile? A. No.

Mr. Stanbury Cross-examine, if you wish, sir.

The Court: Did you ever hear it referred to as American Auto Club?

The Witness: No. I can tell you how it is referred to.

(Testimony of Mark A. Wells.)

The Court: We have had testimony here of Three A's and [133] Triple A and AAA.

The Witness: Yes, that is the way it is referred to.

Cross-Examination

By Mr. Rowe:

Q. Mr. Wells, this Insurance Journal is what is commonly known as a trade journal, is it not?

A. It is a trade insurance newspaper.

Q. Trade and insurance newspaper?

A. Trade insurance newspaper.

Q. And is published how frequently?

A. Published weekly.

Q. And is circulated among the insurance companies and firms and agents and brokers of Southern California? A. Yes.

Q. Have you ever heard of the plaintiff company, American Automobile Insurance Company, referred to as American Automobile Company?

A. No.

Q. Have you ever heard either of the plaintiff companies referred to as American Automobile Insurance Company?

A. Yes, American Automboile Insurance Company.

Q. You have? A. Yes.

Q. And that reference has been made to it by people, shall we say, in the trade, that is, the insurance field. [134]

A. Well, may I explain that?

(Testimony of Mark A. Wells.)

Q. Certainly.

A. The reason for the adaptation of a colloquial in the business is because of the fact that there are many corporations doing business in the insurance business. That is why we refer to the company of the Travelers, not the Travelers Fire Insurance Company or the Travelers Indemnity Company, or the Travelers Life Insurance Company, but rather the Travelers.

Mr. Rowe: I think he is going a little beyond my question, your Honor.

The Court: You go ahead and finish, and then you may move to strike it out. Have you finished?

The Witness: No. I was going to say you were attaching the name "Insurance Company." Every insurance company has either "Insurance Company" or "Assurance Company," or something of that character attached to it. So, for the purposes of close association—

The Court: I think you are going beyond the question now.

Mr. Rowe: Then I assume the entire answer may be stricken, your Honor?

The Court: No; just the last part, the very last part.

Q. (By Mr. Rowe): Is that a frequent occurrence that you hear of the plaintiff company referred to in that fashion? [135]

A. In the business?

Q. Yes. A. No.

Q. In discussing the company with lay people,

(Testimony of Mark A. Wells.)

if you have ever discussed it with lay people, have you heard it referred to as American Automobile Insurance Company? A. No.

Q. You are not an insurance agent, yourself?

A. No.

Q. And you represent no company?

A. No.

Q. You are familiar with the fact, are you not, that since 1944 the advertisement material that American Associated Insurance Companies have placed in your Journal follows, generally speaking, the arrangement set up here?

The Court: I do not think that was gone into on direct examination.

Mr. Rowe: All right. I have no further questions. [136]

* * *

ROBERT J. WHITE

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. White, what is your occupation, sir?

A. Insurance agent.

Q. How long have you been an insurance agent?

A. Since 1936—'32. Sixteen years.

Q. I believe you also are past president of the Insurance Association of Los Angeles?

(Testimony of Robert J. White.)

A. That is correct.

Q. And you are a director of that at the present time? A. That's right. [139]

Q. Are you the chairman of the Educational Committee of the California State Insurance Agents Association, or last year were you?

A. Last year I was.

Q. One of the companies with which you have an agency contract is the American Automobile Insurance Company, I believe?

A. That is correct.

Q. Do you have occasion to talk about that company with members of the insurance profession? A. I do.

Q. Do you have occasion to talk about that company with members of the public?

A. Yes, sir.

Q. Under what circumstances?

A. Discussing insurance policies as to where their coverage may be placed.

Q. Do you have anything to do with the handling of claims? A. Yes, sir.

Q. Do you have a reasonably accurate idea of how many claimants, either assureds or third-party claimants you come in contact with in the course of a year?

A. Well, in our office it would be probably somewhere in the neighborhood of about 200, I would say, for this [140] company.

Q. Can you tell us whether or not among the people with whom you have had occasion to discuss

(Testimony of Robert J. White.)

these plaintiff companies there is any nickname or common nickname by which they are referred?

Mr. Rowe: Just a moment. Is this to his reference or their reference?

Mr. Stanbury: I am referring to the people with whom he deals, those people who have been generally described in his testimony.

Q. (By Mr. Stanbury): Do you remember the question?

A. Yes. It is usually referred to as American Auto.

Q. Is there any other insurance company or any other association or organization of any kind that you have ever heard of which is known as American Automobile or American Auto? A. No, sir.

Q. You are familiar with the American Automobile Association, are you not? A. Yes.

Q. Have you ever heard anybody refer to that organization as either the American Automobile or the American Auto? A. I never have.

Q. Have you in the course of your work seen—without taking time to study all of this matter which composes [141] Exhibit 8 in detail, can you tell us whether or not you have ever seen any of that material? A. Yes, I have.

Q. Have you ever sent any of that out to the public?

A. Yes, I have sent quite a bit of it out.

Q. When you say “quite a bit” what do you mean?

(Testimony of Robert J. White.)

A. Well, we follow the practice in our office of using some kind of material of this kind as envelope stuffers in practically every piece of mail that leaves the office, and we use this company's material to a large extent.

Q. In the course of your business, then, you have sent out various items from this composite that is known as Exhibit 8 here? A. Yes, sir.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Well, the witness is now identifying to me particular pieces that he has used, but I am not interested in that.

Cross-Examination

By Mr. Rowe:

Q. Are you using any of the documents now to which you have referred from Exhibit 8?

A. Yes, sir.

Q. Which one?

A. We use this one here, their form No. 25025.

Q. This is the only one that you are using now?

A. No. We use others, too, but I see that one right on the top. We use quite a bit of that one, because it is quite clear.

Q. Do you see any others that you are presently using?

A. I don't know whether we have any more of those left, but we have used them. There were a series of similar items to this that we have used.

Q. I would like you to identify any others that are in actual use now.

(Testimony of Robert J. White.)

A. I would have to check my supplies at my office, Mr. Rowe.

Q. Are you unable to recognize from the documents in front of you those particular ones that you use?

A. We have some now that we are using now that are not here. They are more up to date as to this contact, particularly.

Q. Will you supply me with some of those if I get some one to your office to pick them up?

A. Yes, sir.

Mr. Stanbury: I expect some here before the morning is over, but not from this gentleman.

Mr. Rowe: That will be fine.

Mr. Stanbury: Pardon me. I will have to correct that statement. The material that is on the way here this morning is material currently being printed. Leftover supplies [143] of previous printing, I have not. That would have to come from this witness.

Mr. Rowe: From Plaintiffs' Exhibit 8, which consists of a great number of folders, this witness has identified two folders which he states are now in use by him as an insurance agent, and I would like to have these two marked with some separate identification as having been identified by this particular witness.

The Court: Let them be marked as Defendant's Exhibit F and Defendant's Exhibit G, for identification.

(Testimony of Robert J. White.)

Mr. Rowe: That will be satisfactory, your Honor.

(The documents referred to were marked Defendant's Exhibit F, and Defendant's Exhibit G, for identification.)

Q. (By Mr. Rowe): Mr. White, have you ever heard the American Automobile Insurance Company and its associated companies referred to as American Associated Insurance Companies or American Associated? A. Occasionally.

Q. Have you seen advertising within the last few years of these companies under that name?

A. Yes, sir.

Q. In discussing these companies or the plaintiff companies with men in your business, have you heard them referred to as American Associated?

A. Very rarely.

Q. Isn't it a fact that in the insurance business when one or more companies have common ownership it is customary for them to advertise under groups? A. That is correct.

Q. And isn't it a fact that over a period of time they become known as groups; that is, for example, the Loyalty group? A. Yes, sir.

Q. How many other groups can you name for me?

A. Well, there is the Loyalty group, the Home group, Phoenix, Connecticut group, I believe you call U.S.F.&G. a group. There are others.

Q. There are a great number. There is an American Four group? A. Yes, sir.

(Testimony of Robert J. White.)

Q. Which is advertised as American Four?

A. That is correct.

Q. I happen to have here a publication, Underwriter's Report, dated October 25, 1948, on the front sheet of which appears an advertisement, "Convention Greeting, Glen Falls Group."

Mr. Stanbury: Objected to as immaterial as to how Glen Falls refer to themselves.

The Court: I think he is just referring to them as a [145] matter of example.

Mr. Rowe: That is correct.

The Court: A short reference is all right, but don't take up too much time on it. The witness has already testified that there are groups.

Q. (By Mr. Rowe): This is typical of the thing you are discussing? A. Similar to it.

Mr. Stanbury: The same objection, your Honor, that it is immaterial.

The Court: It has been answered.

Q. (By Mr. Rowe): Mr. White, are you a chairman of the Educational Committee of the Insurance Association of Los Angeles? A. No, sir.

Q. Isn't that what your testimony was?

A. No, sir. I was chairman of the State Association, Educational Committee, last year.

Q. What is the function of that committee?

A. To provide—stimulate educational programs throughout the local member associations to raise the standard of the agency ranks.

Q. That is to train insurance agents to as nearly as possible a professional capacity?

(Testimony of Robert J. White.)

A. That is correct. [146]

Q. Insurance agents such as you are consider themselves as occupying at least a semi-professional capacity?

A. We strive to.

Q. In that capacity you are familiar with all the various companies which write insurance?

A. With a good many of them, yes, sir.

Q. You know generally that there are many names of insurance companies which are similar to each other?

A. There is some similarity.

Q. There is some, is there not?

A. Yes.

Q. There is more than some, isn't that true?

A. Yes, perhaps so.

Q. Is there any part of your training of your men to teach them to distinguish between companies?

Mr. Stanbury: Objected to, your Honor, as not proper cross-examination.

The Court: It is overruled.

A. We endeavor to teach students to distinguish between the types of companies.

Q. (By Mr. Rowe): Well, as a matter of fact, there is no confusion to speak of in the insurance field by reason of this name similarity, isn't that true?

Mr. Stanbury: The same objection, if your Honor please, that it is not proper cross-examination. [147]

* * *

The Court: The objection is sustained.

Q. (By Mr. Rowe): You testified, Mr. White,

(Testimony of Robert J. White.)

that you have an agency contract with the American Automobile Insurance Company? A. Yes, sir.

Q. Is it one of the conditions of that contract that your insurance business belongs to you and not to the company?

Mr. Stanbury: Objected to as not proper cross-examination, and not the best evidence, and immaterial, your Honor.

Mr. Rowe: He says he has got a contract, your Honor.

The Court: The objection is sustained. It isn't the best evidence.

Mr. Rowe: Do you have a copy of your form contract, Mr. Sessions?

Mr. Sessions: No, I don't.

Q. (By Mr. Rowe): You have, Mr. White, a group of persons whom you serve as your clientele, is that correct? A. Yes, sir.

Q. You obtained the patronage of those persons by [149] reason of the services you render, do you not? A. To a large extent.

Mr. Stanbury: If your Honor please, the same objection that it is not proper cross-examination?

The Court: It is overruled.

* * *

Q. (By Mr. Rowe): When the ordinary individual or any individual wants to place insurance through you in some company which you represent, or wants to place it through you, if I may restate the question that way, isn't it a fact that you desig-

(Testimony of Robert J. White.)

nate the company in which the insurance is to go in a great majority of the instances?

* * *

A. Yes, that is correct.

Q. (By Mr. Rowe): The average individual calls you, does he not, and simply says, "I want coverage of so much on [150] my house, my car," whatever it may be?

A. That is the customary practice.

Q. And that is true in the casualty and in the fire field, particularly, isn't that right?

A. That is right.

Q. In the life field the situation is different?

The Court: We are not concerned with life insurance.

Mr. Rowe: I withdraw the question. No further questions. [151]

* * *

ELMER WISSMANN

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. Wissmann, what is your occupation, sir?

A. I am insurance manager at Barker Brothers.

Q. You are not an insurance agent or broker?

A. I am not.

Q. Are you an assured of the American Automobile Insurance Company? A. I am.

Q. That is personally? A. Yes, sir.

(Testimony of Elmer Wissmann.)

Q. For any length of time was Barker Brothers an assured of that company?

A. Yes, from 1924, to my knowledge, to approximately 1939, 1940, I can't tell exactly.

Q. Do you have anything to do in a private capacity with the automobile insurance problems of other employees at Barker Brothers?

A. Because of my long tenure in office as insurance manager many of the employees, especially those who have been [153] with us over a long period of time, will come to me for advice; if they are in an accident, or if they want any advice regarding insurance, they will come to me for that advice.

Q. Are any of them assureds of the American Automobile Insurance Company?

A. Yes, quite a number of them, especially those who have been in our employ for a long time. We had our fleet with the American Auto for many years, and as a result a number of the employees took their policies out many years ago and have continued.

Q. Have you had occasion to talk with lay people—when I say “lay” I mean non-insurance people—employed by Barker Brothers concerning the American Automobile Insurance Company?

A. Yes, I have talked to them.

Q. Infrequently or frequently, or what?

A. Rather infrequently. I suppose maybe on an average two or three a week or a month. There is no particular time.

(Testimony of Elmer Wissmann.)

Q. Have you noticed whether or not those persons have any designation for the American Automobile Insurance Company, other than the full name of that company, when they refer to it?

A. We always have referred to it as the American Auto. We never say "American Auto Insurance." It seems [154] superfluous.

Mr. Rowe: I didn't hear the last statement.

The Court: Read the answer.

(The answer was read by the reporter.)

Mr. Rowe: I move to strike the last part.

Mr. Stanbury: "It seems superfluous"?

Mr. Rowe: Yes.

Mr. Stanbury: I have no objection to that going out.

The Court: It may go out.

Q. (By Mr. Stanbury): Have you had any conversation with any person in which the terms "American Associated" have been used in referring to the plaintiff company or companies?

A. No, we never refer to "American Associated." I presume because of the long standing of our insurance relations with the American Auto, back from 1924, as far as I am concerned.

Q. Have you ever heard of an organization other than the plaintiff companies here, the American Automobile Insurance Company and the American Automobile Fire Insurance Company, referred to as American Automobile or American Auto?

A. I don't quite get your question, Mr. Stanbury.

(Testimony of Elmer Wissmann.)

Q. Have you heard any other organization, other than these plaintiff companies, referred to as American Automobile or American Auto? [155]

A. No, I have not.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Cross-Examination

By Mr. Rowe:

Q. Mr. Wissmann, I understood you to say that Barker Brothers has been an assured of the American Automobile Insurance Company from 1924 to 1940?

A. Yes, approximately that time. I am not certain of the 1940, but as a firm we had a fleet of over 100 pieces of equipment and we were insured with the American Auto during that period of time.

Q. At that time and now you were employed by Barker Brothers as their insurance expert?

A. Insurance manager.

Q. That is, you direct the taking out of all the insurance that Barker Brothers takes?

A. That is right.

Q. Have you any connection with Personnel Department of Barker Brothers?

A. Not directly, no. I work in connection with them, because my work ties in with Personnel.

Q. Employees of Barker Brothers know you over this period of years in the capacity that you are employed by that company? A. Yes, they do.

Q. And it is for that reason they come to you regarding insurance matters?

(Testimony of Elmer Wissmann.)

A. Yes. They are referred by other employees, if they have an accident, or if they want anything, they tell them, "Maybe you had better see Mr. Wissmann, maybe he can help you."

Q. May I ask you did American Automobile Insurance Company offer policies to employees of Barker Brothers on a fleet basis or any sort of group basis, or anything of that nature?

A. They do not.

Q. Do you have many employees there who come to you and say, "I want to put my insurance in American Automobile Insurance Company"?

A. I would be quite surprised if they were to. They come up and they may ask me who would be a good company, and I tell them about the Auto Club and the Farmers. I say, "Don't you have a broker?" and if they say, "Yes," I say, "Well, you had better consult your broker."

Q. In the absence of consulting a broker they come to you and ask you for advice about, "In what company should I put my insurance?" Is that substantially correct?

A. If they were to ask——

Q. I say do they?

A. Once in a great while. Very infrequently.

Q. Then, do they come to you after their insurance has been placed for them by other agents or brokers?

A. They don't say whether they have or not. I ask them if they have a broker, and I tell them that that is who they should contact.

(Testimony of Elmer Wissmann.)

Q. I understood you to say on your direct examination that many of the employees at Barker Brothers come to you for advice about insurance policies?

A. Yes.

Q. What do you mean by that?

A. They might ask me about life insurance, they might ask me about an accident that they have been in, or maybe some member of the family who might have been injured, and what would I suggest they do.

Q. When that comes up in the case, for example of an injury or perhaps an accident in which the employee has been involved, do you ordinarily inquire in what company the employee has his insurance?

A. No, I am not concerned, because they have no insurance—that is, they are the injured person, there would be no insurance company involved.

Q. Then what is the occasion for you discussing American Automobile Insurance Company with these various employees?

A. I don't discuss American Auto Insurance with them [158] unless they have insurance. If they have insurance with the American Auto they come up and say, "Could you call the broker for me?" They have been doing that, let us say, for the last 20 or 25 years.

Q. And if they came up and said, "I have had an accident," or "I have a claim," would you say, "In what company do you have your insurance?"

A. No.

(Testimony of Elmer Wissmann.)

Q. How would you know what broker to call?

A. That is only on ordering insurance, not as far as a claim is concerned.

The Court: I think you are talking about two different things.

Mr. Rowe: We may be.

Q. (By Mr. Rowe): Let's confine ourselves to employees who want insurance, let's just discuss them for a moment. You have some employees there who come to you to ask advice about the placing of insurance, is that correct?

A. Yes, what type of insurance to buy, and possibly where to order it.

Q. Do you advise the employee where it should be placed? A. No.

Q. What do you do if they ask you where it should be placed? [159]

A. I ask them who their broker is, to consult their broker. I am not selling insurance and I am not directing anybody to any broker or any company.

Q. So with those people you would have no occasion to discuss American Automobile Insurance Company or any other company, is that correct?

A. That is correct.

Q. Is that the great number of your contacts with these employees about insurance, are they of that nature?

A. No. Most of my contacts are regarding an accident and what I would suggest they do. Once in a great while, maybe—I would say in a year's

(Testimony of Elmer Wissmann.)

time—I haven't given it any thought, maybe 10, 15, maybe not that many people come to me and say, "Where should I buy my insurance? What kind should I have, and what would you suggest?"

Q. We were talking a second ago about claims; are we back to buying now?

The Court: Never mind about getting back to buying. Have you finished cross-examining about the claims?

Mr. Rowe: No.

The Court: Just go right ahead.

Q. (By Mr. Rowe): My question to you was this: Referring now to the employees of Barker Brothers who may come in to discuss a possible claim, either against them or in their favor, do you first ask each of those employees [160] in what company his insurance is?

A. No, I am not in the least bit concerned.

Q. What do you tell them?

A. If they say they have been injured, I tell them to consult a physician. I did that yesterday with a lady who had suffered an accident, and she wanted to know just what she should do. I said, "If you are bothered with this injury you had better consult with a physician."

Q. Under what circumstances would you discuss the name of an insurance company with any of the employees of Barker Brothers?

A. Are we still talking about claims, may I ask?

Q. Yes.

(Testimony of Elmer Wissmann.)

A. I would never discuss an insurance company about a claim.

Q. And you would never discuss the name of a company or anything else? A. No, sir.

Q. Let's go back to the other thing, about the possibility of buying insurance. I understood you to say if an employee of Barker Brothers came to talk to you about buying insurance you would refer him to a broker?

A. To his broker. I say, "Do you have an insurance broker?" And if they say, "Yes,"—they come to me to find out what type of insurance I would recommend, not the [161] company, but the type of insurance.

Q. They never suggest the company to you?

A. No, there is no object. If they ask me: What do you think of a certain company? I will say, "Well, they are all right. As far as I know they are all right." I don't like to get into those discussions with them about companies, because I am far too busy.

Q. What I am trying to find out is what is the occasion for you to discuss the name American Automobile Insurance Company, or any variation of that name, with an employee of Barker Brothers?

A. Many employees who have been with us over a long period of time have been insured with the American Auto, and through the years they have called me up or come up and say, "Will you just renew that insurance with the American Auto," because I am in contact with that office on firm busi-

(Testimony of Elmer Wissmann.)

ness all the time. They happen to know me personally over maybe 15, 20, 25 years. I handle no insurance for them, but I will phone, as I am calling this particular broker who handles our firm business, and I will say, "By the way, Mary Jones was up and she wants her insurance renewed."

Q. In discussing the insurance with those people you refer to American Automobile Insurance Company as American Auto? [162]

A. We always say "American Auto." We never say "American Automobile Insurance Company."

Q. You say that in your firm since you have had the fleet policy?

A. We have always called it just American Auto.

Q. As I understand it, this testimony you have just given about American Auto, in discussing it with the employees, has no relation to the purchase of any insurance? A. None whatever.

Mr. Rowe: No further questions.

* * *

H. PERK, JR.

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Stanbury:

Q. Mr. Perk, you are an insurance agent, are you not, sir? A. Yes, sir.

Q. How long have you been such?

(Testimony of H. Perk, Jr.)

A. Since 1912.

Q. And you have held various offices in the national, [163] local and state association, I believe?

A. Yes, sir.

Q. Are you an agent of these two plaintiff companies, American Automobile Insurance Company and American Automobile Fire Insurance Company?

A. We are not an agent.

Q. Do you place business with them?

A. We do.

Q. You are a broker, then, are you?

A. Yes, sir.

Q. As far as the American Auto Companies are concerned, you are a broker, is that correct?

A. That is correct.

Q. Over how long a period of time have you placed assureds with the American Automobile Insurance Company?

A. Since the early '20s; about 1921.

Q. Have you had occasion in the course of your business as an insurance agent and broker to refer to these plaintiff companies?

A. Yes, sir.

Q. And to hear others refer to them?

A. Yes, sir.

Q. Is there any shortened appellation or nickname commonly used by people to whom you have talked in the insurance business when referring informally to these [164] plaintiff companies?

A. There is.

Q. And what is that appellation?

A. American Auto.

(Testimony of H. Perk, Jr.)

Q. Do you know of any other insurance company or any other organization of any kind that is referred to as American Automobile or American Auto, other than these plaintiff companies?

A. I do not.

Q. Have you ever heard the American Automobile Association referred to as American Automobile or as American Auto by any person?

A. I have not.

Q. As an insurance broker have you ever distributed to clients of yours, or to anyone else, any of the pamphlets represented in this group here which is plaintiffs' Exhibit 8? Mr. Perk, to save time, are you finding any or not?

A. Yes, these that I am selecting.

Q. You are selecting a group, and I have interrupted you in the middle of it, but I take it you are selecting samples of those that you have distributed from your office?

A. That is correct.

Q. And in what quantities, approximately?

A. Well, we generally use various of these circulars in our mail matter. We use them as stuffers, as advertising [165] material, and for information to the public.

Q. Do you know whether or not you have any of those at the present time, or not? Are you able to give an accurate answer to that question?

A. Do you mean of this particular—

Q. Of any of those particular types now, do you know whether you have or not?

(Testimony of H. Perk, Jr.)

A. No, I don't think we have now. We have the revised form of these items.

Q. Up to about what time were you distributing these very kinds that you are looking at now?

A. Up to the time the American Auto acquired ownership of the Associated Indemnity.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Cross-Examination

By Mr. Rowe:

Q. May I see the pamphlets you have picked out? A. That group (indicating).

Mr. Rowe: Mr. Stanbury, I think I could save some time if I might ask you this question. It was my understanding that these pamphlets which form Plaintiffs' Exhibit 8 were not sent out by the company to agents or brokers for distribution to the public after 1943. Is that correct?

Mr. Stanbury: After 1943, was it, or 1944?

Mr. Rowe: '43, I think. [166]

Mr. Stanbury: That statement is correct, unless I correct it before this case is over. I believe that is so. I am investigating it again this morning.

Mr. Rowe: That was the stipulation that went with the exhibit, and if that is the case I don't have to cross-examine on it at all.

Mr. Stanbury: The court may take it for granted that that is correct, unless evidence to the contrary, that I don't expect, is introduced. I heard something this morning which raised a question in my mind, and that is what I am investigating.

(Testimony of H. Perk, Jr.)

Mr. Rowe: One of your witnesses raised a grave question in my mind.

Mr. Stanbury: He is the one that I got my information from. But the court may take it for granted unless I prove to the contrary those particular issues stopped in 1943.

The Court: That is referring to part of—

Mr. Rowe: Every pamphlet, your Honor, that forms Plaintiffs' Exhibit 8.

Mr. Stanbury: That's right.

Q. (By Mr. Rowe): Calling your attention to these six pamphlets from Plaintiffs' Exhibit 8, I understood you to say these have not been sent out to your customers or clientele for a number of years, is that correct?

A. That is correct. We did use up all of the supplies [167] of the particular form that we had, even after the company acquired the Associated Indemnity.

Q. But you have completed using those?

A. When those were used up then we secured the revised issue of the pamphlets published by that company.

Q. Mr. Perk, as a broker you regard your clients as your own, do you not? A. Correct.

Q. And you maintain those clients by reason of the service that you render?

A. That's right.

Q. And the service that you render consists in placing insurance for them and in rendering help

(Testimony of H. Perk, Jr.)

to them in all ways possible in connection with any claims which may arise under that insurance?

A. Correct.

Q. In the selection of a company in which insurance is placed by you, isn't it a fact that in the vast majority of the cases you select the company?

Mr. Stanbury: That is objected to as not proper cross-examination, your Honor, and also immaterial.

Mr. Rowe: May I be heard?

The Court: Wait just a moment.

I believe it is, Mr. Stanbury, in view of the fact that this witness testified that he sent out some of these pamphlets [168] for the purpose of conveying information to his clients, I think it is cross-examination. It is overruled.

Q. (By Mr. Rowe): Is that true, Mr. Perk?

A. Yes, we make the choice of the company. The public generally will object to some company they don't want to be placed with.

Q. I beg your pardon, sir?

The Court: Read the answer.

(The answer was read.)

Q. (By Mr. Rowe): Is that a fair statement, the public generally will object to some company they don't want to be placed with?

A. When I said "the public" I meant——

Mr. Stanbury: Just a moment. I'm objecting to that, your Honor, as immaterial, incompetent, what the public generally does.

The Court: This witness gave the answer, and I

(Testimony of H. Perk, Jr.)

think the objection should be overruled so that it may be understood.

The Witness: I started to explain the answer.

The Court: You may go ahead, Mr. Perk.

The Witness: May I explain the answer, your Honor?

The Court: Yes, you may.

The Witness: When I used the term "general public" I mean prospects for insurance that we were then interested [169] in.

Q. (By Mr. Rowe): You represent as a broker—withdraw the question.

The Court: As I understood his answer, it was, in substance, unless one of his prospective clients objected to some particular insurance company having the client's business, that they would leave it entirely to you and you would select the company, is that correct?

The Witness: That is correct.

The Court: Would that happen frequently that an objection would be made?

The Witness: It is not frequent, but it does happen.

The Court: Go ahead, Mr. Rowe.

Q. (By Mr. Rowe): Would you say it happened in as many as five per cent of your customers?

A. No. It wouldn't be one per cent.

Mr. Rowe: No further questions.

HAROLD C. GILLESPIE

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [170]

Direct Examination

By Mr. Stanbury:

Q. Mr. Gillespie, what is your occupation, sir?

A. Manager, Los Angeles Branch Office, United States Fidelity & Guaranty Company.

Q. That is the company known as the U. S. F. & G.?

A. That is correct.

Q. That company is a competitor, I believe, of the American Automobile Insurance Company, the American Automobile Fire Insurance Company, the Associated Indemnity Company, and the Associated Fire and Marine Company, is it not?

A. That is correct.

Q. Do you have any connection at all with these plaintiff companies, which for your precise information are the two American companies—do you have any connection with either of those companies?

A. No connection whatever, except in a competitive way.

Q. How long have you been the manger of the U. S. F. & G. here?

A. Since 1929.

Q. And continuously?

A. Continuously.

Q. During that time have you had occasion to talk to people in the insurance business here in Los Angeles about [171] these plaintiff companies?

A. Yes.

(Testimony of Harold C. Gillespie.)

Q. And can you tell us whether or not there is in general use some nickname whereby these plaintiff companies are referred to?

A. These companies are always referred to, at least in our experience, as the American Auto.

Q. Do you know of any other organization of any kind anywhere that you have ever heard referred to as American Automobile or as American Auto? A. No.

Q. Do you know the organization known as the American Automobile Association? A. Yes.

Q. Have you ever heard anybody refer to that as either the American Automobile or as the American Auto? A. No.

Mr. Stanbury: Cross-examine, Mr. Rowe.

Cross-Examination

By Mr. Rowe:

Q. Mr. Gillespie, are you aware of the fact that in about 1942 or '43 these two American companies, as Mr. Stanbury described them, bought out two other insurance companies and now operate a group known as American Associated Insurance Companies? [172] A. Yes.

Q. Have you ever heard anyone refer to the companies by that name?

A. Well, I can't recall any specific instance of their being referred to in that fashion. It is always the American Auto in our experience.

Q. You never heard the words "American Associated" used?

(Testimony of Harold C. Gillespie.)

A. I can't recall any specific instance of where I have heard it used.

Q. Can you say that you have never heard it used? A. I wouldn't want to say that.

The Court: That is argumentative.

Mr. Rowe: Withdraw it.

Q. (By Mr. Rowe): Have you seen the advertising under that name?

A. Yes, I have seen it.

Q. Have you had letterheads bearing that name, or letters? A. I don't recall any.

Q. You have had no correspondence with them?

A. We don't have any correspondence with them.

Mr. Rowe: I have no further questions. [173]

JAMES WALLACE

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mr. Wallace, what is your occupation, sir?

A. Insurance broker.

Q. How long have you been an insurance broker?

A. Since 1928.

Q. You have your office here in Los Angeles?

A. Yes, in the Barker Building.

Q. Are you an agent of either the American Automobile Insurance Company or the American Automobile Fire Insurance Company?

A. A broker.

Q. That is, you are not an agent?

(Testimony of James Wallace.)

A. Not an agent.

Q. For how long a period of time have you placed assureds with the American Auto Company?

A. I would say approximately 1930.

Q. Since then?

A. Yes, since then.

Q. Continuously? [174] A. Continuously.

Q. Have you had occasion to talk to people, both as assureds and other people engaged in the insurance business, concerning these plaintiff companies?

A. Yes.

Q. And can you tell us whether or not there is in common use any shortened name or nickname by which these companies are known?

A. Yes; American Auto.

Q. Have you ever heard of these companies being referred to in informal conversation as American Associated? A. Seldom.

Q. Since they have been amalgamated can you tell us whether or not the nickname American Auto has gone out of use among the people with whom you converse concerning these companies?

A. No. It is continuously referred to as American Auto.

Q. And have you ever heard of any other organization anywhere that is referred to either as American Automobile or as American Auto?

A. No.

Q. You are familiar with the organization known as the American Automobile Association, are you not? A. Yes. [175]

Q. Can you tell us whether you have ever heard

(Testimony of James Wallace.)

it referred to either as American Automobile or as American Auto? A. Never.

Q. Do you know whether or not the American Automobile Association sells insurance or brokers insurance at least in this locality?

A. No, it does not.

Q. Do you know what outlet, if any, it has in this locality, or what affiliate it has in this locality, if any?

A. You are referring now to the American——

Q. To the AAA.

A. It is an automobile club, a service club for automobiles.

Q. Do you know what its affiliate is in this district, if any? Do you know? A. No.

Mr. Stanbury: All right, sir. No further questions.

Cross-Examination

By Mr. Rowe:

Q. Mr. Wallace, as an insurance broker you have a clientele of your own? A. Yes.

Q. And you place the insurance for that clientele in companies which you choose for the most part? [176] A. Mostly, yes.

Q. In the vast majority of the instances?

A. Yes.

Q. How many companies do you represent?

A. Quite a number. I would say fifteen or twenty.

Q. And you are familiar with——

(Testimony of James Wallace.)

The Court: I understand that he represents these companies.

The Witness: I am a broker for them.

Mr. Rowe: I believe that is right. I misstated it.

Q. (By Mr. Rowe): You place insurance with fifteen or twenty companies? A. Yes.

Q. You don't have an agency with any?

A. With some.

Q. You do have an agency contract with them?

A. Yes.

Q. With what companies do you have an agency contract? A. Employers Liability.

Q. Is that the only one?

A. And then, of course, we have agency contracts with life insurance companies, but that isn't pertinent.

Mr. Rowe: I have no further questions.

Mr. Stanbury: That is all. Thank you, Mr. Wallace. [177]

Mrs. Older, will you step up, please?

MARY E. OLDER

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stanbury:

Q. Mrs. Older, what is your occupation?

A. I am a chief telephone operator for the American Associated Insurance Company.

(Testimony of Mary E. Older.)

Q. How long have you been such?

A. For five years.

Q. And that is a common switchboard, is it not?

A. Yes, sir, it is.

Q. How do you answer the phone?

A. American Associated.

Mr. Stanbury: This is already in evidence, your Honor, that is, the telephone book, page 33 of the white directory. It has been referred to, and you were to present that, and I was to produce the yellow page.

Your Honor, I can inform the court, then, this is a fact, because it is in evidence: that directly above the "American Auto Ins Co" is "American Auto Assn. Agcy. RIchmond 3111."

Q. (By Mr. Stanbury): Mrs. Older, do you know what that [178] phone number Richmond 3111 is assigned to?

A. That is the Southern California Automobile Club.

Q. And the address given in the book is 2601 South Figueroa; do you know if that is the address of the Automobile Club of Southern California?

A. That is correct.

Q. As a switchboard operator of these plaintiff companies, the Associated Companies, can you tell us whether or not you receive telephone calls from people whom the conversation discloses are intending to reach the Automobile Club of Southern California or the American Automobile Association?

A. Yes, we receive any number of calls.

(Testimony of Mary E. Older.)

Q. I will get to the number in a moment. How frequently does that occur?

A. I would say we average four or five calls a day.

Q. Have you been on duty this morning?

A. Yes.

Q. When did you quit duty this morning?

A. Well, I left the switchboard about five minutes of nine.

Q. Did you have any call for Richmond 3111 this morning?

A. I had a call a quarter of nine for the American Automobile Association. [179]

Q. You might give us an illustration or some illustrations—withdraw that. Is there any general type of inquiry that is made of you by these people?

A. Well, the general—

Mr. Rowe: I object to that upon the ground it is hearsay, your Honor.

The Court: It is sustained.

Mr. Stanbury: No further questions.

Cross-Examination

By Mr. Rowe:

Q. Mrs. Older, you say you have been the chief telephone operator at this American Associated Insurance Company for five years?

A. That is correct.

Q. At any time during the five years have the telephone switchboard operators answered under

(Testimony of Mary E. Older.)

the name "American Auto"? A. Yes, I did.

Q. That is when you first went there?

A. I answered "American Auto" until the two companies merged and we changed our location, we combined the two switchboards, and we changed the answer to "American Associated."

Q. How many calls a day would you say come in over your switchboard? [180]

A. That is pretty difficult. We haven't had a check from the telephone company in quite some time.

Q. Do you recall what your last checks were?

A. We have 24 incoming trunk lines. I would say—I am just guessing, it is impossible to be exact on this, anyway the calls vary depending on busy days and dull days, and so forth, I would say they average from 350 to 500 calls a day.

Q. And you have 24 incoming lines?

A. That is correct.

Q. How many operators?

A. We don't have any outgoing lines, we have what is known as a P A X board, that is, private automatic exchanges; all our outgoing calls the people dial 9 and get a line. We handle incoming calls only.

Q. How many operators do you have?

A. Two regular operators and two relief operators.

Q. So there are two on the board all the time?

A. Yes.

(Testimony of Mary E. Older.)

Q. You would estimate you handle 500 calls a day?

A. Yes, that would be a heavy day; but from 350 to 500, I would say, would be an average.

Mr. Rowe: I have no further questions.

The Court: I want to ask a question, please.

Mrs. Older, when you first went there your answer to calls was that it was American——

The Witness: American Auto.

The Court: Just American Auto?

The Witness: Just American Auto.

The Court: What do you answer now?

The Witness: American Associated.

The Court: When did you change?

The Witness: I think I remember the date. I think it was in '44, July of '44 I believe the two companies merged and we changed our location.

The Court: You hadn't been there more than a year or so then?

The Witness: I had been there about a year and a half.

The Court: That is all.

DON R. SESSIONS

recalled as a witness by the plaintiffs, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Stanbury:

Q. Do you have any compiled annual records of how much money the American Auto or American Auto Fire paid out on claims since 1947, Mr. Sessions? [182]

Mr. Rowe: I object to that upon the ground the record is the best evidence.

Mr. Stanbury: I don't understand that, your Honor. I am not asking for the record. I was going to elicit the information about 1947, and as a preliminary explain why I couldn't do it for 1948.

The Court: I think unless you lay a foundation that the objection would be good. If it is a matter of record it should not take very long to lay the foundation.

Mr. Stanbury: All right, your Honor.

The Court: What the court has in mind is, I think it is Section 1855 of the Code of Civil Procedure, Subdivision 5, which states that where there are a number of figures or the records are voluminous, that one who is examining them may state the result without having the records present.

Mr. Stanbury: Yes, sir.

Q. (By Mr. Stanbury): Do you have the rec-

(Testimony of Don R. Sessions.)

ords here in court, Mr. Sessions? A. I do.

Q. All right. Will you get them, then? I didn't know you had them here.

A. I have our local office records.

Q. This record that counsel is examining now, is that of the American Auto Insurance or American Auto Fire Insurance or both combined? [183]

A. Both.

Mr. Rowe: Frankly, it is going to have to be explained before I can understand it.

Q. (By Mr. Stanbury): Do you have a record here showing how much money was paid out to clients in 1947 by the American Automobile Insurance Company alone?

A. I do not. This is combined.

Q. Combined with the American Automobile Fire Insurance Company? A. Correct.

Q. Do you have the figures for those two companies combined, without the Associated being included? Is that correct?

A. That is correct. May I explain that I can separate these as to American Auto Fire and American Auto, first, by the lines.

The Court: You have not been asked to do that yet.

Q. (By Mr. Stanbury): Is there any compiled record yet for a later year, 1948?

A. No, I haven't yet the 1948 record.

Q. So the one you have is the latest?

A. Yes.

(Testimony of Don R. Sessions.)

Q. Have the figures gone up or down for 1948, if you know, over 1947?

Mr. Rowe: Just a moment. [184]

A. I don't know.

The Court: He says he doesn't know.

Q. (By Mr. Stanbury): How much money was paid out by the American Automobile Insurance Company and the American Automobile Fire Insurance Company on claims in 1947?

A. One million four hundred seventy-four thousand—

Mr. Rowe: Just a moment. If that is a matter of record I will object to the question on the ground the record is the best evidence. If that is a record, I object to the question on the ground the proper foundation has not been laid.

Frankly, I may be dull, but I can't understand that sheet.

The Court: You have examined the records, have you? Do you have the records before you?

The Witness: This is the record I received from our claim department.

The Court: Do you understand it?

The Witness: Yes, I do. I can explain it.

The Court: Is this a record that was kept in the regular course of business of your company?

The Witness: Our claim department keeps this record.

The Court: Can you answer the court's question? Of the two companies?

(Testimony of Don R. Sessions.)

The Witness: I don't know that I know what you mean by [185] "regular course of business."

The Court: Mr. Stanbury, the court assumes that you are familiar with the statute.

Mr. Stanbury: I am familiar with the statute, and invoke it habitually. I didn't think this was a matter that was of such vital importance to counsel that there would be any objection, so I didn't expect to introduce the records.

The Court: We have the objection, and we are faced with the objection.

Mr. Rowe: May I make this suggestion, Mr. Stanbury? If we could discuss the thing, perhaps during the noon hour, I am perfectly willing to stipulate to it. I just don't understand the record and I would like to know about it before it goes into evidence.

Mr. Stanbury: I would rather lay the foundation, your Honor.

The Court: Proceed.

Q. (By Mr. Stanbury): Do these plaintiff companies keep records of the money they spend?

A. Yes.

Q. Did they in 1947? A. They did.

Q. Do you pay income taxes?

A. Of course.

Q. Do you make profit and loss statements?

A. They do at the head office.

Q. Is a recordation of the money paid out on claims a matter of which the company keeps accurate records? A. Yes, it is.

(Testimony of Don R. Sessions.)

Q. Is there any part of the business of these plaintiff companies that is set up with employees whose duty it is to keep track of the expenditures made? A. Yes.

Q. Where did you obtain the document you now have?

A. From our claim department manager.

Q. Is that kept in some sort of file?

A. His secretary keeps it.

Q. And that secretary is an employee of the company? A. That's right.

Q. I assume that the plaintiff companies have an elaborate bookkeeping system? A. Yes.

Q. And off the books that are kept does it run off recapitulation of expenditures for claims year by year?

A. They take them off by months, at the end of each month, and then add them up at the end of the year.

The Court: Mr. Stanbury, I think if you would ask the question as is provided in U.S.C.A.—28 U.S.C.A., 695, I believe it is—that it would simplify this. My recollection is that the section provides that a record may be [187] received in evidence if it is shown that it is kept in the regular course of the business of the company, the plaintiff companies, and that it is the regular course of the business to keep such records.

Mr. Stanbury: The reason I didn't ask it was that your Honor asked it.

(Testimony of Don R. Sessions.)

The Court: I didn't ask it fully.

Mr. Stanbury: All right, your Honor.

The Court: I think Mr. Sessions with his business experience should know what the regular course of business is.

Q. (By Mr. Stanbury): Mr. Sessions, is it part of the regular course of business of these plaintiff companies to keep these records of moneys spent on claims? A. It is.

Q. And was the record that you have there now made in the regular course of the business in that connection of these companies?

A. Yes, it was.

The Court: And does the regular course of the business require that such records be kept?

Q. (By Mr. Stanbury): And does the regular course of the business of these plaintiff companies require that you keep these records?

A. We require it for our own information.

Q. Can you answer it yes or no, does [188] the regular course of your business require that you keep a record of the moneys spent on claims?

A. It does for us, yes, sir.

Q. And do you have in your hand one of those records showing the expenditures by the company to claimants in 1947? A. I do.

Mr. Stanbury: All right. Now, if counsel wants to clutter up the record with the document I am ready to put it in. Otherwise I would merely ask him to give the figures.

(Testimony of Don R. Sessions.)

Do you wish it to go in evidence?

Mr. Rowe: I have no desire of either cluttering up the record or prolonging the examination. I was simply shown something that I don't understand and I wanted to have it explained.

Mr. Stanbury: I offer it in evidence, your Honor, as Plaintiffs' next in order.

The Court: Let it be received and marked as Plaintiffs' Exhibit 10.

(The document referred to was marked Plaintiffs' Exhibit 10, and was received in evidence.)

Q. (By Mr. Stanbury): Explaining this record, Mr. Sessions, which figure or figures on it shows the expenditures made by these two plaintiff companies to claimants in 1947?

A. This total, one million—— [189]

Q. Is it the bottom figure in the column over which is printed the word "Paid," is that right, Mr. Sessions?

A. That is correct.

Q. What was the sum of money paid out for claims?

A. \$1,474,340.

Q. Do you have a record made in the regular course of the business of these companies showing to how many claimants that sum of money in the aggregate was paid?

A. This also is on this sheet. Pardon me. We have here only the total of accident claims received for that year. Those are not necessarily the ones that we paid this money to.

(Testimony of Don R. Sessions.)

Q. Then I will ask you if you have a record made in the regular course of the business of these plaintiff companies showing how many claims for damages were received in 1947 against assureds of the company? A. I have.

Q. How many, sir? A. 23,258.

Q. Do you have any other records showing to what percentage of those claimants the money represented by that \$1,474,340 was paid?

A. No, I have not.

Q. No record of that here?

A. Not here. [190]

Q. But it would be some part of this twenty-three thousand, or else their predecessors from previous years whose claims have not been adjusted yet? A. Yes.

Q. And I assume some of those twenty-three thousand claimants of 1947 who may not have been settled with until '48, or perhaps not until the present time?

A. Yes, we have this in our reserves.

Q. Do you have forms of policies now currently being used by the plaintiff companies here?

A. Yes, I do.

Q. Will you pick out the current policies, please, sir? A. Yes.

The Court: Court will take a recess for a few minutes.

(A recess was taken.)

(Testimony of Don R. Sessions.)

Q. (By Mr. Stanbury): Have these plaintiff companies done anything to increase their automobile business during recent years?

A. No.

Q. For what reason?

A. For the last three years we have been suffering from high loss ratios and have not tried to develop or increase our automobile insurance business.

Q. Has the company during the last three years or [191] thereabouts done any advertising to your knowledge concerning the acquisition of automobile insurance? A. Not that I recall, no.

Q. Are you able to state now what the future or permanent policy of these companies may be in that connection?

A. Only that we will undoubtedly try to develop it in the future when the proper time arrives.

Q. That is, you can't forecast the future any more than anyone else?

A. Not definitely, no.

Q. What is the actual date when the Associated Indemnity, having been purchased by the American Auto, started doing business together?

A. In Los Angeles our offices were merged on July 1, 1945.

Q. You brought some policy forms that are being used by these plaintiff companies today, have you? A. Yes.

Q. Is any automobile policy put out which has

(Testimony of Don R. Sessions.)

the name of the American Auto Companies and any of the Associated Companies on the policy?

A. We put out none of them here, and there are none that I know of.

Q. Is there any policy that you have seen in any line [192] that has American Associated on it, or American Auto and Associated Indemnity, or any combination of American and Associated?

A. No.

Q. That is, the coverages are separate?

A. That is correct.

Q. I believe you told us yesterday which companies carry the automobile insurance?

The Court: He explained all that.

Mr. Stanbury: All right, your Honor. There are a lot of these policies, gentlemen, and they are all available for you to introduce if you wish. There is only one I am interested in. That is this comprehensive personal liability. If you want them all in they certainly should go in.

Mr. Rowe: I would. As a matter of fact, I can cut it to two.

Mr. Stanbury: Let's put them all in.

Mr. Rowe: All right.

The Court: There being no objection, let them be received as one exhibit, which will be Plaintiffs' Exhibit 11.

Mr. Stanbury: All right.

The Clerk: So marked.

(Testimony of Don R. Sessions.)

(The documents referred to were marked plaintiffs' Exhibit 11, and were received in evidence.)

Q. (By Mr. Stanbury): Are each and all of these [193] policies, which are self-explanatory as to their coverage, now currently being issued by these plaintiff companies. A. They are.

Mr. Stanbury: No further questions.

Cross-Examination

By Mr. Rowe:

Q. Mr. Sessions, I show you two policies which form a part of Plaintiffs' Exhibit No. 11, and direct your attention to the last page of those two policies on which appears the emblem which is used by American Associated Insurance Companies, is that correct? A. That's right.

Q. On that emblem appears the words "American Associated Insurance Companies" and the initials which customarily form a part of that emblem?

A. That is correct.

Q. That policy bears the same emblem on the face above the names of the two companies?

A. It does.

Q. And is that one of the policies that are in current use at this time? A. It is.

Q. That is the policy you use for your comprehensive automobile policy?

A. That's right, for individual [194] insurance.

Mr. Rowe: I will ask that that be given some

(Testimony of Don R. Sessions.)

separate identification marks. Perhaps it is sufficiently identified.

Q. (By Mr. Rowe): Directing your attention to this second one which is called a combination automobile policy, that likewise carries the emblem of American Associated Insurance Companies at the top of the front sheet?

A. That is correct.

Q. And the initials? A. Yes.

Q. And also—I presume that is the end of the policy? A. Yes.

Q. At the end of the policy provisions are the names of the two American Automobile companies, and the American Associated Insurance Companies' emblem with the initials?

A. That is correct.

Q. And this policy is captioned Combination Automobile Policy? A. Yes.

Q. Is that the policy that is in current use at this time? A. It is also in current use.

The Court: Mr. Rowe, he stated that all of those forms of policy are in current use.

Mr. Rowe: I was just going to ask him one more question [195] about it.

Q. (By Mr. Rowe): I notice here another policy which is headed "Comprehensive Automobile Liability Policy"; is this the same type of insurance policy as the one I showed you a moment ago called "Comprehensive Automobile Policy"?

A. It is the same type except it is confined to

(Testimony of Don R. Sessions.)

automobile liability, and we use it for commercial fleets.

Q. Commercial fleets? A. Yes.

Q. In other words, the two that I first called to your attention are the policies which you now send to individual assureds, is that correct?

A. For automobile insurance only.

Q. For automobile insurance only?

A. That is correct.

Q. The policies to which I now call your attention under the heading "Comprehensive General Liability Policy, Comprehensive Automobile Liability Policy"—

Mr. Stanbury: There is one missing here.

Q. (By Mr. Rowe, Continuing): —are used for what purpose?

A. Those are also used for commercial assureds.

Q. Is that fleet coverage?

A. It might be fleets in the case of automobile; in case of general liability, it wouldn't involve any automobile. [196]

Q. What is the difference between those and this last one?

A. This one is what we call a comprehensive personal liability and automobile policy in combination for individual insureds.

Q. I am a little confused. You use them all now—

A. I can help you. These for individuals cover automobiles only. This one for individuals covers

(Testimony of Don R. Sessions.)

the personal liability, residence liability, and general liability for individuals, along with automobile insurance.

Q. I see. I understood you to state that for three or four years past these two companies have made no attempt to secure additional automobile insurance, is that correct?

A. We have made no attempt to increase our writings, yes.

Q. You have been continuing your advertising during that period?

A. We have carried institutional advertising, of course, throughout that period.

Q. I show you the Insurance Journal of November, 1948, and direct your attention to the last sheet. Is that one of your advertisements in connection with automobile insurance? A. It is.

Q. And that advertisement at the bottom in large black [197] letters contains the words "American Associated"? A. It does.

Q. With the same emblem that you had on two of the policies? A. Yes.

Q. And the full names of the company in smaller type at the bottom? A. That is correct.

Mr. Rowe: I would ask to offer just this last sheet in evidence, your Honor, as Defendant's exhibit next in order, and I have a number of them that I intend to put in as part of my case. I think perhaps they should be a single exhibit.

The Court: Is that part of a present exhibit?

(Testimony of Don R. Sessions.)

Mr. Rowe: No. This is new.

The Court: Use your own judgment, Mr. Rowe.

Mr. Rowe: At this time I ask that it be marked as Defendant's Exhibit next in order for purposes of identification.

The Court: Let it be marked as Defendant's Exhibit H for identification.

The Clerk: Defendant's Exhibit H for identification.

Mr. Rowe: Mr. Sessions, the amount of money you quoted a few moments ago as having been paid out to claimants, does that amount represent the cash paid out or the cash [198] plus the reserves which are set aside for claims?

A. The cash only.

Q. Actually the cash paid out? A. Yes.

Q. That is the cash paid out in Southern California?

A. It was paid out in our Los Angeles branch in 1947.

Q. Does that include the San Francisco branch?

A. It does not.

Q. Nor the Portland, nor Seattle?

A. No.

Q. And it is limited to American Automobile Insurance Company and the American Automobile Fire Insurance Company?

A. That is correct.

(Testimony of Don R. Sessions.)

Mr. Rowe: I have no further questions.

Mr. Stanbury: Just one more question.

Redirect Examination

By Mr. Stanbury:

Q. In connection with your auto business, the advertisement counsel has shown you concerns auto insurance; can you tell us, please, whether or not the plaintiff companies have been rejecting automobile insurance applications on any considerable scale during the period of years that you have told us they have not been pushing automobile insurance sales?

A. Well, I can say that we have been restricting our [199] writings as much as possible to our former volume.

Q. Have you cut out any agents in connection with insurance, or any brokers in connection with automobile insurance, or not?

A. That has been necessary where the business has been too unprofitable, yes.

Q. Has that taken place on a minor scale, a large scale, or what?

A. Two or three years ago it was fairly extensive, I guess.

Q. What was fairly extensive two or three years ago?

A. The elimination of unprofitable accounts.

Q. Was that automobile or all lines?

A. That was chiefly automobile.

(Testimony of Don R. Sessions.)

Mr. Stanbury: I have no further questions.

Mr. Rowe: I have just one question along that line.

Recross-Examination

By Mr. Rowe:

Q. While you have been making this conscious attempt to decrease your amount of automobile business, have you concentrated on the other lines which are carried by your other companies?

A. Yes, we have.

Mr. Rowe: That is all, Mr. Sessions.

The Court: You are excused, Mr. Sessions. Step down. [200]

Mr. Stanbury: I am recalling Mr. Muller as an adverse witness.

WALTER MULLER

recalled as a witness by the plaintiffs under Rule 43(b), having been previously sworn, testified further as follows:

Examination

By Mr. Stanbury:

Q. There is one question I forgot to ask you, sir. Before you applied for the name American Auto Club, you knew there was an American Automobile Insurance Company? A. No, sir.

Q. You knew there was a concern listed in both the white and yellow Los Angeles phone books as American Auto Insurance Co., didn't you?

(Testimony of Walter Muller.)

A. No, sir.

Q. I will refresh your memory by your deposition, page 12, taken October 8, 1948, and ask you to read lines 16 to 18 to yourself.

A. Yes, sir.

Q. Have you read it? A. Yes, sir.

Q. "Q. When you took this name did you know that there was listed an American Auto Insurance Co."—Pardon me. I will have to ask you to read back to page 12, line 9 to line 18. Read it all, please. [201] Have you read that?

A. Yes, sir.

Q. "Q. Now, before taking the name 'American Auto Club' did you look in the phone book to see if any other automobile concern was listed as American Auto? A. Sir?"

"Mr. Stanbury: Would you read it, please, Mr. Clark.

"(Question read by reporter.)

"A. Yes, sir.

"Q. When you took this name did you know that there was listed an American Auto Insurance Company? A. I probably did."

Now, was that accurate when you gave it?

A. When you asked me that I was thinking in regard to any other auto club.

Q. When you were asked "Did you look in the phone book to see if any other automobile concern was listed as American Auto" and you said "Yes, sir," did you mean you looked in the phone book?

(Testimony of Walter Muller.)

A. I looked in the phone book under the auto clubs.

Q. When you were asked, "Did you know that there was listed an American Auto Insurance Company," and you said, "I probably did," did you mean that you probably did? [202]

A. Your question inferred that there was such a name listed. I never did look under insurance companies to see if there was any other American Auto Club or American Insurance Company listed.

Q. So when you said here: "Q. Did you know there was listed an American Auto Insurance Company?" and you said, "A. I probably did," what did you have in mind?

A. I probably did not, because I never looked under the insurance companies at that time.

The Court: Did you finish, Mr. Muller?

The Witness: Yes.

Q. (By Mr. Stanbury): When you said, "I probably did," what you meant was, "I probably did not," is that it? A. Yes, sir.

Mr. Stanbury: No further questions.

Mr. Rowe: I have no questions.

Mr. Stanbury: That will be all, your Honor, save for a very brief matter. I can easily finish by 12:00. Counsel has looked them over. I have the page that I promised to bring yesterday, except that I thought it better to get the September, 1947, Los Angeles yellow directory in case the thought might arise that perhaps the present name had been

planted on account of this law suit, so I went back to the classified for the previous year, September, 1947, and I will offer page 649, marked in red, as Plaintiffs' [203] next exhibit in order, and I will write at the top that it is 1947, L. A. Classified.

And then lastly, your Honor, I have a number of books from other cities here which are offered merely, certain pages, for the purpose of showing that throughout the country this company is listed both as shown in the books brought by the defendant yesterday and also as in Los Angeles, namely, in many cities, as American Auto Ins. Co. I can make that very rapid, I think.

The Court: Let the offered exhibit be received and marked as Plaintiffs' Exhibit 12.

The Clerk: So marked.

Mr. Stanbury: I will offer the following as a combination exhibit, if there is no objection. They are marked in red. The white Portland directory for June, 1948, "Amer Auto Ins Co."

The Court: Let me make a suggestion, Mr. Stanbury. Mr. Rowe, the court assumes, will not object to it, and will probably desire to offer the parts similar to ones offered in other directories—is that correct, Mr. Rowe?

Mr. Rowe: That is correct.

The Court: Will you gentlemen agree upon all those between now and 2:00 o'clock?

Mr. Rowe: We certainly will.

The Court: And the offer can be made all at one time [204] and it will save a good deal of time.

Mr. Stanbury: All right, sir. It has been done, however, because the defendant put in theirs already, although there is one more in my list.

The Court: I assume that he will want these others to go in.

Mr. Stanbury: All right, sir.

Mr. Rowe: Your Honor, I have a witness here under subpoena from the telephone company that I don't think will take over five minutes. I wonder if I could call him out of order.

The Court: If it won't take more than five minutes you may call him out of order.

(The exhibit marked Plaintiffs' Exhibit 12, for identification, was received in evidence.)

Mr. Rowe: Mr. McCoy, will you take the stand, please?

CHARLES G. McCOY

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. Will you state your full name, please?

A. Charles G. McCoy.

Q. Your residence?

A. 323 North Sunset Boulevard, Temple City.

Q. What is your occupation?

A. I am a special agent for the Pacific Telephone and Telegraph Company.

(Testimony of Charles G. McCoy.)

Q. Are you here under subpoena today?

A. I am.

Q. Were you asked by us to bring with you all the records of the Telephone Company pertaining to the listing of American Automobile Insurance Company in the Los Angeles directories?

A. I was.

Q. As far back as you could go? A. I was.

Q. Did you go back and secure the records of the company as far as the records went?

A. I did.

Q. How far do those records go?

A. 1939 in the classified listings and 1940 in the alphabetical section.

Q. After looking at the records which you got out of the files of your company did you check those records against the books for the respective years involved?

A. I checked the directories only for the year of 1940.

Q. Will you please state the documents that you have produced, what they are? [296]

A. We have a transcribed service application card covering service on Trinity 2311, switchboard located at 111 West 7th street, on the ninth floor in Los Angeles. [207]

DON R. SESSIONS

recalled as a witness by the plaintiffs, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Stanbury:

Q. You were asked to bring a copy of the agency contracts used by the plaintiff companies?

A. I have it with me.

Mr. Stanbury: I am not introducing this, but I understand you want it. Do you want it to go in evidence?

Mr. Rowe: It apparently is some different type of contract than I had in mind.

Q. (By Mr. Stanbury): You also were going to find out if the companies had put out any pamphlet form of advertising such as found in Exhibit 8, or any successor thereto, since 1944. Have they put out any such advertising at all?

A. I have looked into it and I find we have not.

Q. Either as American Associated, American Auto, or anything else? A. That is correct.

Q. In other words, this type of advertising has been [208] in abeyance since about 1944 in any name?

A. If they order any of that material we will send them whatever supply we have left of the older material, if they want to use it.

Q. Is there any separate corporation which amalgamates all four or any group of the four of these

(Testimony of Don R. Sessions.)

two American Auto Companies or the two Associated Companies?

A. No, there is not, no legal entity by that name.

Q. And neither the American Automobile Insurance Company, nor the American Automobile Fire Insurance Company have been dissolved, have they?

A. They have not.

Q. And in the name of which company is the bank account of the group kept?

A. The bank account here is in the name of the American Automobile Insurance Company.

Q. And has there been any filing of a certificate to do business under a fictitious name, under the name American Associated or any such combined name?

A. Not that I know of, no.

Q. Is the Associated Fire and Marine an active company?

A. No; that is completely inactive.

Q. The other three companies still are existing as corporations? [209]

A. Yes.

Mr. Stanbury: I assume that the corporate existence of these companies can be admitted?

Mr. Rowe: Yes.

Mr. Stanbury: I notice one of the answers raises a jurisdictional point, but I assume that is on a matter of law rather than evidence, is it not?

Mr. Rowe: Not on the matter of evidence.

Mr. Stanbury: Nothing further.

Cross-Examination

By Mr. Rowe:

Q. The name American Associated Insurance

(Testimony of Don R. Sessions.)

Companies is the trade name which these companies have been using since about 1944.

Mr. Stanbury: Just a minute. I am objecting to the form of that question because it assumes that no other name has been used at all. The question is the trade name. It is calling for a conclusion of this witness, as well as being an ambiguous question.

The Court: Is it a trade name?

The Witness: It is a trade name.

Q. (By Mr. Rowe): And is it the trade name of the companies, plaintiffs in this action, as well as the third company which is still actively associated?

The Court: Is it a trade name or the trade name? Do [210] you want to make it the only one?

Mr. Rowe: I was asking whether it was the trade name under which these three companies were operating.

The Court: Do you have one trade name under which they operate?

The Witness: I would say it is a trade name, because we also operate under the individual company names.

Mr. Rowe: I have no further questions.

Mr. Stanbury: That is all, Mr. Sessions. Step down.

Now, with the telephone books, your Honor, they can now go into evidence as one consolidated Exhibit if the court permits, without any delay at all.

The Court: That is, certain pages have been torn from them?

Mr. Stanbury: I am offering references to either of the plaintiff companies from the torn pages of these directories, and I am asking leave to identify them briefly into the record. Shall I pass them to Mr. Enstrom to be passed to the court as I identify them, or not?

The Court: Yes, that is satisfactory.

Mr. Stanbury: All right, your Honor. The first is the Manhattan—that is Manhattan, New York, not California—yellow classified, marked in red “Amer Auto Ins Companies.”

The Court: For what year?

Mr. Stanbury: All for 1948, your Honor, the latest ones. [211]

Seattle, the yellow classified, “Amer Auto Ins Co,” and in the white “Amer Automobile Ins Co’s”; Portland, Oregon, the white, “Amer Auto Ins Co,” and in the classified “American Auto Ins Co”; Cleveland, Ohio, in the white, “Amer Auto Ins Co,” and in the classified “American Automobile Insurance Co” in heavy black type. Indianapolis, yellow classified, “American Auto Ins Co” in heavy black type, and in the white, Amer Automobile Ins Co”; Boston, in the yellow classified, “American Associated Insurance Companies,” in large black type with a large box following it, and thereafter “American Auto Insurance Co” in heavy black type. And in the white for Boston, “Amer Auto Ins Co” followed by seven lines of subheadings which do not mention other companies, but departments, appar-

ently, of the company. Then without obliterating the Western or Northwestern Section—I don't have the copy of the Northeastern here—we can agree, I imagine, that in the current Western Section of the Los Angeles Extended Area there is an entry in the white, there being no classified for that district, "American Auto Ins Co" with the phone number given, and that in the Northwestern Section of the Los Angeles Extended Area, current edition, there is the entry "American Auto Ins Co." Is that so stipulated?

Mr. Rowe: So stipulated.

Mr. Stanbury: And these telephone books belong to the [212] court, so I will give them back to the secretary.

Mr. Rowe: May we, with reference to the Western Section of the telephone book, the one to which you first referred, stipulate that immediately preceding the listing which you referred to appears the listing "American Associated Ins Co's" with the same telephone number?

Mr. Stanbury: I will so stipulate that there is a similar entry in most, although not all of the sheets just introduced; offered for introduction, they have not yet been marked.

The Court: And in this last one, the one for Boston, there appears set out in a space blocked off by a dark line, "American Associated Insurance Companies" immediately under that space "American Auto Insurance Companies."

Mr. Stanbury: Your Honor will find it in all but one or two books. May those be received as the Plaintiffs' next in order?

The Court: They may be received as Plaintiffs' Exhibit 13.

The Clerk: So marked.

(The documents referred to were marked Plaintiffs' Exhibit 13, and were received in evidence.)

Mr. Rowe: In connection with this exhibit, your Honor, I would like to ask that there also be admitted in evidence from the two sheets coming from Boston, Massachusetts, the [213] following listings which appear in the white alphabetical portion: "Amer Auto Accessory Mfg Corp," "Amer Auto Parts," "Amer Auto Parts Co," "Amer Auto Touring Alliance."

The Court: They may be received.

Mr. Rowe: From the Cleveland alphabetical list immediately following the listing to which reference has just been made appears a listing, "Amer Auto The-Overseas Edition." And in the Portland alphabetical portion appears the listing "Amer Auto Sales."

Mr. Stanbury: Then, your Honor, subject to defendant's counsel bringing in that page from the white—that is essential to our case, the white sheet, I want to show where their concern would be listed in connection with ours—subject to introducing the

current page of the Los Angeles white directory which carries the names of these plaintiff companies, we rest your Honor.

Mr. Rowe: Mr. McCoy, will you take the stand again, please?

CHARLES G. McCOY

called as a witness by the defendant, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Rowe:

Q. When we adjourned, Mr. McCoy, I think you were about to identify the records you had brought with you in [214] response to the subpoena which was served upon you. Have you those records?

A. I have.

Q. Will you produce them, please?

You have before you certain ruled white pasteboard papers. I will ask you to state what those documents are.

A. This white card here is what we call a service application card which becomes a part of the permanent record of the telephone company.

Q. Does that card go back to some certain year?

A. This card is dated 4-5-46, at which time it was transcribed from a card dated 9-23-40.

Q. This 9-23-40 is the oldest card you could find?

A. That is the oldest card we have.

(Testimony of Charles G. McCoy.)

Q. Does this card indicate how the subscriber has requested its, his, or her listing in the Los Angeles telephone directory?

A. It indicates the listing as shown in the telephone company directory at the time this card is dated.

Q. So that by a reference to that card can you tell me how in 1940 American or The American Automobile Insurance Company was listed in the Los Angeles telephone directory?

Mr. Stanbury: I am objecting to that, if your Honor please, on the ground that that is not the best evidence. I presume those books are obtainable.

Mr. Rowe: I haven't been able to get them.

Mr. Stanbury: Well, I am objecting to that, because I think that is incompetent and unreliable evidence, if your Honor please, how it was shown in the book from this card.

Mr. Rowe: May I just for the purpose of trying to obviate any delay ask this question:

Q. (By Mr. Rowe): Mr. McCoy—

Mr. Rowe: I think his objection is good, your Honor.

Q. (By Mr. Rowe): Mr. McCoy, have you examined the listing in the Los Angeles telephone book for the year 1940? A. I did.

Q. Does the listing as it appears on this white card compare—

Mr. Stanbury: Just a minute.

(Testimony of Charles G. McCoy.)

Mr. Rowe: He is not going to put the card in. I was just trying to show—

Mr. Stanbury: Pardon me. I interrupted you.

The Court: I don't think Mr. Rowe finished his question.

Mr. Stanbury: I say he hadn't. I interrupted him, and then I kept quiet. I am sorry.

Q. (By Mr. Rowe): Does the card that you have before you indicate correctly the manner in which American Automobile Insurance Company was listed in the telephone book in Los Angeles in 1940? Just answer that yes or no. [216]

A. No.

Mr. Stanbury: It is objected to as not the best evidence. The witness says he has seen that book. It must be in existence.

Mr. Rowe: I just say I haven't got it.

Mr. Stanbury: I submit the best way, your Honor please, to know what the 1940 book shows is to see the 1940 book. I don't want to cause a delay in the trial for such a thing as that. I don't know what the answer is going to be, for that matter.

Mr. Rowe: I can tell you.

Mr. Stanbury: May I ask a few questions on voir dire to straighten this up, your Honor?

The Court: Yes.

Voir Dire Examination

By Mr. Stanbury:

Q. Mr. McCoy, this double card that you have here seems to be concerned with 1940, one item for

(Testimony of Charles G. McCoy.)

1940, which has Day and Night Call on it, one for 1943 that is scratched out——

A. May I——

Q. Just a moment (continuing): Then you have five entries for '45, and then all the rest are 1948. That is correct as far as that part is concerned, isn't it? A. That is correct [217]

Q. Then this other card that you have, this single card, has one entry for 1940?

A. This card was transcribed to this one here (indicating).

The Court: The court will suggest that you withdraw this witness and wait until we have a recess and go over them. It may be that it is a matter that you can agree upon and not take the time trying to figure out what these cards mean at the present time.

Mr. Rowe: Permit me to ask just one other question, then, on another subject, your Honor.

Direct Examination

(Resumed)

By Mr. Rowe:

Q. Mr. McCoy, does the Telephone Company have certain rules and regulations with regard to abbreviations and names that are listed in the telephone books? A. We do.

Q. Are those regulations printed?

A. They are.

Q. Do you have a copy of those regulations with you? A. I do.

(Testimony of Charles G. McCoy.)

Q. Will you produce it, please?

A. (Witness does as requested.)

Mr. Rowe: Would you like to look at this, Mr. Stanbury?

Mr. Stanbury: Yes. I still say that if I have time to [218] confer with you and find out what you are trying to prove maybe we can stipulate to it.

The Court: That is why the court suggested that.

Mr. Rowe: I just hesitate to keep this man. I had him here all yesterday afternoon, and I hesitate to keep him for all this afternoon. Can we confer for a few minutes now, or shall we wait until your Honor has a recess?

The Court: You go ahead and confer privately.

(Slight delay in proceedings.)

Mr. Rowe: Then, may it please the court, subject to Mr. Stanbury's approval this is the stipulation: that the plaintiff company, American Automobile Insurance Company, was listed in the Los Angeles telephone book in 1940 as "Amer Automobile Ins Co." Prior to 1940, that should be. In 1940 the listing was changed to the manner in which it now appears as "American Auto Insurance Co." That the records of the Telephone Company contain no request from the subscriber, American Automobile Insurance Company, to change the listing in the manner I have just indicated. And, further, that the policy or regulations of the Telephone Company, in the absence of any opposition from a subscriber, or

(Testimony of Charles G. McCoy.)

contrary specific request, is to abbreviate the word "Automobile" by using the word "Auto."

Mr. Stanbury: So stipulated.

Mr. Rowe: That is all, Mr. McCoy. [219]

Cross-Examination

By Mr. Stanbury:

Q. In order, Mr. McCoy, to get any listing in the classified, is it necessary to have an application from the subscriber? A. No, it is not.

Q. In order to get heavy type it is necessary for the subscriber to apply, is it not?

A. That is true.

Q. And in order to get a box——

The Court: And an additional charge is made for the heavy type?

The Witness: Yes.

Q. (By Mr. Stanbury): And in order to get a box, that is to say, some writing matter, not an advertisement, but writing matter surrounded by a black line, the subscriber has to order that, is that right? A. That is true.

Q. And pay for it? A. That is true.

Q. So, calling your attention to Plaintiffs' Exhibit 12, the page from the 1947 Los Angeles classified telephone directory, the American Automobile Fire Insurance Company and/or the American Auto Insurance Company, had to order and [220] to pay extra for the large type here "American Auto Fire Insurance Co" and "American Auto Insurance Co," followed by the box, did they not?

(Testimony of Charles G. McCoy.)

A. They would.

Q. And in any of the other classified directories in which the same heavy black type and/or box appears, so far as you know, the same would be true?

A. Are you speaking of the Southern California areas or other cities and states?

Q. Other cities.

A. I could not answer your question.

Q. In the yellow classified the subscriber specifies what language it wants, save for abbreviations that you dictate; that is right so far, is it not?

A. Will you repeat that?

Q. The subscriber tells you what language he wants in his specially paid for classified listing, does he not?

A. Yes, within limitations set down for the directories.

Q. That's right. I am coming to that now. You have certain abbreviations which you prescribe, unless the subscriber objects?

A. Yes. If the subscriber specifically requests the word to be printed in full it would be printed in full.

Q. So if the subscriber objected to "American Auto [221] Insurance Co.," would you spell it "American Automobile Insurance Co"?

A. We would

Q. Do you have any documents there that show whether or not the American Automobile Insurance Company or Fire Insurance Company gave you a

(Testimony of Charles G. McCoy.)

written order for this listing in the Los Angeles classified telephone directory?

A. This is 1946 for the '47 directory.

The Court: You will have to talk louder, Mr. McCoy.

Q. (By Mr. Stanbury): Speak up, Mr. McCoy, please. A. No, I do not.

Q. This sheaf of documents that you have handed me is what?

A. That is the advertising department's copies of advertising contracts or orders which have been received by the advertising department

Q. All right. At the top of this sheet, partly obliterated by papers stuck over it, it says, "Southern California Telephone Company Directory Advertising," does it not? A. I believe so.

Q. At the top of the page after the printed word "Name" is written "American Associated Ins Co" with the "Associated" scratched out and "Auto" written over it, does it not? [222]

A. That is true.

Q. Who did that, do you know?

A. I do not.

Q. All you know is that somebody changed "Associated" to "Auto"? A. That is true.

Q. And that is dated December, 1946, is it not?

A. Right.

Q. And then the next one you have handed me, or that is 1943, that says under "Name" "American Auto Insurance Co"? A. That is correct.

(Testimony of Charles G. McCoy.)

Q. Perhaps the one I just looked at is the latest?

A. I believe it is.

Q. No. Here is a 1948. There the name is "American Auto Insurance Co" typed in, is it not?

A. Yes. That is being removed from the directory showing in this listing here.

Q. Being removed from the directory?

A. Being removed from the directory.

The Court: That is on a slip that has to be filled out if there is a removal, is that it?

The Witness: No, sir. That is a slip which presumably carries all the information regarding additional directory advertising. [223]

The Court: What shows that it is being removed?

The Witness: The fact that this has been scratched out and on this page it has two columns, one showing in, which means service going in, and the other showing out, which shows the service which is being removed.

Q. (By Mr. Stanbury): What is going in?

A. In the succeeding directory.

Q. Pardon me just a moment. Didn't the yellow classified directory come out in this city from the phone company in November, '48, the month just passed?

A. That I am not prepared to state.

Q. The document which you say is a removal document, the only date on that is April 30, 1948, is it not?

A. That is correct.

Q. I understand now. What is coming out is "American Auto Fire Insurance Company"?

(Testimony of Charles G. McCoy.)

A. That is right.

Q. That is the only removal order you are talking about?
A. Apparently.

Q. You have no order to remove "American Auto Insurance Company" or "American Automobile Insurance Company"?
A. No.

The Court: That is clear enough.

Q. (By Mr. Stanbury): What are these? These are [224] advertising contracts, aren't they?

A. Yes, they are.

Q. Throughout those contracts, are ones you have with the American Automobile Insurance Company referred to both as "American Automobile Ins Company" and "American Auto Ins Company"?

A. That is correct.

Mr. Stanbury: No further questions.

JOSEPH D. THOMAS

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. What is your residence, Mr. Thomas?

A. 2536 Mount Beacon Terrace, Hollywood, California.

Q. What is your occupation?

A. I am deputy insurance commissioner and attorney at law.

(Testimony of Joseph D. Thomas.)

Q. How long have you been admitted to practice in the State of California?

A. I was admitted in September, 1930. [225]

Q. How long have you been connected with the Insurance Department of the State of California?

A. Since October, 1941.

Q. As the deputy insurance commissioner of the State of California will you state whether or not the Department compiles a list of insurance companies which are qualified to transact business in the State of California?

A. Yes, in two forms. We have our own official record, which is on cards; and then annually we print a list which we give out for public distribution.

Mr. Stanbury: I can save you time by stipulating to that list, if you wish.

Mr. Rowe: All right. I offer in evidence at this time, your Honor, Defendant's next in order, a list of insurance organizations authorized to transact business of insurance in the State of California during 1947, and attached to this is a typewritten statement which shows the date on which certain of the companies were licensed in California.

The Witness: Originally licensed.

Mr. Rowe: Originally licensed in California.

The Court: Let it be received and marked Defendant's Exhibit I.

(The document referred to was marked Defendant's Exhibit I, and was received in evidence.)

(Testimony of Joseph D. Thomas.)

Q. (By Mr. Rowe): Mr. Thomas, does the Department of [226] Insurance of the State of California have a list of the names of persons and companies which are licensed as either agents or brokers in the insurance field in California?

A. Yes. That list is on cards in our office. We publish only the names of brokers. The agents are not compiled and printed as a public document.

Q. At my request have you examined that official record and taken from it a list of the various insurance agents and brokers who are qualified to transact business in that capacity in the State of California whose firm names contain or begin with either the word "American," "Auto," or "Automobile"?

A. Yes, the ones who are corporations. We have no ready manner of compiling a list of the individuals who may be operating under the fictitious names which contain the word "American" or "Automobile."

Mr. Stanbury: May I have the last question and answer read?

(The question and answer thereto were read by the reporter.)

Mr. Rowe: Do you have any objection to this?

Mr. Stanbury: No. I will stipulate to it.

Mr. Rowe: I offer as Defendant's next in order the list in which reference has just been made by the witness.

(Testimony of Joseph D. Thomas.)

The Court: Let it be received and marked as Defendant's [227] Exhibit J.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

Q. (By Mr. Rowe): Mr. Thomas, in your capacity as a deputy insurance commissioner did you have occasion to deal with the application of American Auto Club to become licensed to transact business as a motor club in the State of California?

A. Yes, sir.

Q. Is that club at this time licensed and qualified to transact business as a motor club in the State of California, so far as your department is concerned?

A. Yes, sir, it is licensed and has what we call a certificate of authority, which is the same thing as a license, and so far as we are concerned is fully qualified to lawfully transact a motor club business.

Q. As a part of its application to qualify in that regard, is it or is it not true that the Commissioner of Insurance, or your Department, passes upon the name which any corporation hopes to use in this state?

Mr. Stanbury: That is objected to as immaterial and incompetent, your Honor. I would like to be heard on it if your Honor has any doubt on it.

The Court: What is your position with regard to it? [228]

(Testimony of Joseph D. Thomas.)

Mr. Rowe: My position is this, your Honor: that the fact that either the Secretary of State of the State of California or the Insurance Commissioner has approved a name for use of a corporation in this state is not final. It is a matter which I think should be given weight, and I had hoped to be able to prove by this witness that the name had been passed by him in his capacity as a Deputy Insurance Commissioner, and to continue that proof by showing the practice, administrative practice of that department in passing upon names which are presented to it to be used by corporations in this state.

The Court: He has stated that there has been this certificate issued.

Mr. Rowe: That is correct.

The Court: But the method of arriving at the conclusion which in the opinion of his department justifies the issuance of a certificate, is that material?

Mr. Rowe: I felt that the administrative practice in that regard would be material, your Honor.

Mr. Stanbury: May I be heard, your Honor?

The Court: Yes.

Mr. Stanbury: I submit that it would be an attempt to invade the province of the court by showing what someone else did. Your Honor is familiar with Section 294 of the California Civil Code that says that the act of issuing of [229] the Secretary of State in issuing a corporation articles in a certain

(Testimony of Joseph D. Thomas.)

name does not impair the right of injunction at all. So if this gentleman had arrived at a correct conclusion, and if the position of these plaintiffs is altogether wrong here, how can that help the court charged with the duty of deciding that matter, and if he arrived at a wrong conclusion in the opinion of this court, how is that going to help your Honor?

What they are doing is offering your Honor an example of how someone else's mind worked on something.

The Court: I think the objection should be sustained, and it is.

Q. (By Mr. Rowe): Mr. Thomas, do you have among your records there a letter which was addressed to you by the American Automobile—withdraw that—by the American Associated Insurance Companies?

A. We have a letter dated October 20, 1947, which was addressed to the Insurance Commissioner by the American Associated Companies.

Mr. Rowe: May I ask, Mr. Stanbury, if you will stipulate that this is Mr. Sessions' signature and that he sent that letter?

Mr. Stanbury: Yes, I will stipulate that it may go into evidence, if you wish.

Mr. Rowe: And that the copy attached is the reply? [230]

Mr. Stanbury: I am not stipulating to the reply. I object to that as hearsay.

Mr. Rowe: I will ask that the original letter—you don't mind if I substitute a copy?

(Testimony of Joseph D. Thomas.)

Mr. Stanbury: Not at all.

Mr. Rowe: I will ask that a copy of the original letter be admitted in evidence as Defendant's Exhibit next in order.

The Court: It may be received and marked as Defendant's Exhibit K.

Mr. Rowe: And that I may refer temporarily to this yellow letter which I am holding as Defendant's Exhibit K for identification. I don't know whether it will be admitted or not.

The Court: It wouldn't be K for identification. This last one received is K.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit K, and was received in evidence.)

Mr. Stanbury: Does the court's library have a copy of the Insurance Code?

The Witness: I have a copy right here.

Mr. Stanbury: Thank you.

Mr. Rowe: Mr. Stanbury, may I ask if you will stipulate that this copy that I show you is a letter Mr. Sessions [231] received from the Insurance Commissioner in reply to the letter I just offered in evidence?

Mr. Stanbury: I will so stipulate. I may hereafter withdraw my objection, but at the present time I object to it on the ground that it is incompetent and hearsay.

(Testimony of Joseph D. Thomas.)

Mr. Rowe: I will offer the letter in evidence, your Honor, as being the reply to the letter that was just admitted, and ask that it be marked Defendant's exhibit next in order. And if that is to be admitted I would like to substitute a copy.

Mr. Stanbury: May my objection be deemed made now after the offer? I made it prematurely.

The Court: Yes. The court is considering your objection.

Mr. Stanbury: Thank you, sir.

The Court: The objection is sustained.

Mr. Rowe: This copy, I believe your Honor will permit it to be marked for identification as Defendant's Exhibit——

The Court: Is that a copy of the letter objected to?

Mr. Rowe: Yes.

The Court: Let that be marked as Defendant's Exhibit L, for identification.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit L, for identification.) [232]

Mr. Rowe: You may cross-examine.

Cross-Examination

By Mr. Stanbury:

Q. Pardon me, I didn't catch your name.

A. Joseph Thomas.

Q. Mr. Thomas? A. Yes.

Q. Mr. Thomas, you gentlemen in passing on

(Testimony of Joseph D. Thomas.)

names operate under the section of the Insurance Code having to do with your duties in approving or rejecting names, do you not?

Mr. Rowe: Just a moment. I object to the question as incompetent, irrelevant and immaterial. Withdraw the objection.

The Court: You may answer it.

A. Yes, except that it isn't one section. There are a number of them.

Q. (By Mr. Stanbury): Well, 12194 is one of them, is it not? A. That is correct.

Q. Do you want to see the book, or do you have others in mind?

A. There is one at 820, I believe it is. Maybe I am incorrect in the number.

Q. I think you are. I think you have given me the wrong number in 820. [233]

A. It is 880.

Q. All right. 880, and what other ones, sir, if there are any others?

A. May I answer it this way? There are several different types of insurance organizations, I don't want to thumb through all here to check all of them, but there are probably another three or four sections in relation to specific types of companies that require name approval. 880 is the general one which applies to all except the specialized types of companies, and the other one that you refer to is in the Motor Club Act and applies, of course, to a special type of a company.

(Testimony of Joseph D. Thomas.)

Q. The one section, 12194, to which I refer, is the only section that you deem to apply to names of motor clubs specifically, is it not?

A. That is correct, sir.

Mr. Stanbury: If I may, your Honor, even though the court takes judicial notice of this, it is short, and may I read these two sections briefly?

The Court: Yes.

Mr. Stanbury: Section 880, to which you refer, Mr. Thomas, is as follows:

Under "Article 9" "Registration of Insurers' Names."

"Section 880. [234]

"Except as provided in this article, every insurer shall conduct its business in this State in its own name."

And then Section 12194 is under Part 5 entitled "Motor Clubs." Chapter 2, entitled "Conditions of Doing Business":

"Section 12194. The name of a motor club shall be submitted to the Commissioner for approval pursuant to Section 12221, before the commencement of business under the provisions of this part. The Commissioner may reject any name so submitted when the proposed name would interfere with the transactions of a motor club already doing business in this State or is so similar to one already appropriated as to confuse or is likely to mislead the public in any respect. In such case a name not liable to such objections shall be chosen."

(Testimony of Joseph D. Thomas.)

Did your department refuse permission to the defendant to use the name Auto Club of Hollywood?

A. Yes, we did.

Q. The name with which you deemed that conflicting was the Automobile Club of Southern California?

A. And the Automobile Club of Orange County.

Q. "Automobile Club of Orange County?"

A. Yes.

Q. Those are listed, I presume, here on this list?

A. No. Motor clubs are not on that printed list.

Q. You deemed that "Auto Club of Hollywood" conflicted with "Automobile Club of Orange County" and "Automobile Club of Southern California"?

A. I will answer it this way: Those parties made a formal objection before the Department and we had a hearing, and they introduced several days of testimony to show that both of their names had acquired a secondary meaning of "Auto Club"; and based upon that testimony we refused the name "Auto Club of Hollywood" or "Automobile Club of Hollywood."

Q. But when the protest of the American Automobile Insurance Company reached your office, the matter of the application of the Auto Club, the American Auto Club, had already left your department, had it not?

A. Yes, the name had already been approved.

Q. Without any hearing at which the American

(Testimony of Joseph D. Thomas.)

Automobile Insurance Company or American Automobile Fire Insurance Company were heard or appeared; that is right, is it not?

A. That is correct.

Q. In other words, the first protest that you ever got from these plaintiff companies, whether it be due to [236] laches or otherwise, was after the matter had already cleared and gone out of your office, was it not? A. Yes, that is correct.

Q. It is true, is it not, that there is not in California at the present time any corporation, whether it be a club or an insurance company, which is authorized to engage in insurance of any kind, either as an insurer, broker or agent, which combines in its name the word "American" with "Automobile," or the word "American" with "Auto," other than these two plaintiff companies; that is correct, is it not?

A. It is correct with one exception, which isn't a direct exception.

Q. What is it?

A. That is the American Automobile Association, which is not itself licensed. It only has affiliated organizations which are licensed.

Q. I was coming to that next, sir. If you will answer my present question, there is no company authorized to sell insurance as an insurer, or as a broker or agent, whether it be a company, club, or any other corporation, in California at the present time which combines in its name "American" with

(Testimony of Joseph D. Thomas.)

the word "Auto" or "American" with the word "Automobile," except the three companies here, the two plaintiffs and the American Auto Club, isn't that correct? [237]

A. No, there would be one more exception to it.

Q. What is it?

A. There is no corporate agent or broker using that name, but there might be, and I have no way—and our records don't readily show it—there might be individuals or partnership agents or brokers who are using those names under fictitious names which they had registered.

Q. My question specified corporations because of your previous remark to that effect.

A. I didn't catch that. I am sorry.

Q. So the answer is, is it not, that there is no company answering any part of the description contained in my question which combines the word "American" with "Auto," or "American" with "Automobile," other than the three companies before this court now, isn't that correct?

The Court: When you say "company" you mean corporations?

Mr. Stanbury: Corporations, yes.

A. Yes, that is correct.

Q. (By Mr. Stanbury): And if there is any individual or partnership or other association that is authorized to write insurance in any form, either as an insurer, agent or broker, which combines "American" with "Auto" or "American" with

(Testimony of Joseph D. Thomas.)

“Automobile” in its title, you don’t know about it, do you? [238]

A. I don’t say that we don’t know about it. On their applications they indicate the fictitious names under which they may be operating, but we do not, because of lack of clerical help and one thing and another, lift those things out and make a separate index of them. We use the individual names or the name of the partnership itself for our indexing purposes. So the only way that I could truthfully answer your question would be to go through several thousand applications to pick out these——

The Court: Pardon the interruption. I think the question was personal. If there is, you personally don’t know it?

The Witness: No one in our department would.

The Court: I am just asking you.

The Witness: No, I don’t.

The Court: That is what Mr. Stanbury’s question was. The facts that you have recounted here would indicate that if there is such there might be some record in the office, but personally you know nothing about it?

The Witness: Personally I know nothing about it, and if anyone was to make a search of it it would be a very cumbersome job, because we don’t have any ready record of it.

Q. (By Mr. Stanbury): The American Automobile Association is not licensed to sell insurance either as an insurer, [239] broker, or agent, in this state, is it?

(Testimony of Joseph D. Thomas.)

A. That is correct. Nor as a motor club.

Q. Nor in any capacity?

A. That is correct.

Q. In other words, it doesn't even operate in California as a motor club or auto club, does it?

A. Well, it doesn't operate as a licensed one. There are two or three organizations that claim affiliation with it. I don't know exactly their method of operation. But it itself is not licensed.

Q. It has affiliates under different names which deal with the public here? A. That is correct.

Q. One of which during the past year has been the Automobile Club of Southern California, has it not? A. That is correct.

Mr. Stanbury: No further questions, sir. Thank you.

Mr. Rowe: May it please the court, in view of the questions which were put to the witness by Mr. Stanbury, I would like to renew the offer to introduce in evidence the copy which a few moments ago was rejected. As I understood his questions, he went quite fully into how the Insurance Commissioner operated in passing upon a name.

Mr. Stanbury: I would like to be heard if your Honor has any doubt. [240]

The Court: Do you have any objection to it?

Mr. Stanbury: Yes, I do, your Honor, upon the grounds that it is hearsay and incompetent. It is a written opinion, just as oral testimony would be.

The Court: The objection is sustained.

(Testimony of Joseph D. Thomas.)

Redirect Examination

By Mr. Rowe:

Q. Is the American Auto Club licensed to sell insurance in the State of California?

A. No, it is not.

Mr. Rowe: That is all.

Recross-Examination

By Mr. Stanbury:

Q. Is it licensed as a broker or agent yet?

A. It has never filed any application as either an agent or a broker.

Q. As yet?

A. Well, I wouldn't know as yet.

Q. You have checked it up to now, have you, you know that up to now they have not applied for a license as a broker——

The Court: That is all he could say, Mr. Stanbury.

Mr. Stanbury: All right, your Honor. No further questions.

Mr. Rowe: That is all. May we take a few minutes, [241] recess, your Honor?

The Court: We will take a recess at this time.

(A recess was taken.)

Mr. Stanbury: Your Honor, I have the page from the current 1948 white directory with the entry of this company marked in red, "American Auto

Ins Co," and I ask that it be received as Plaintiffs' Exhibit next in order.

Mr. Rowe: I have no objection to it.

Mr. Stanbury: Now we finally rest.

The Court: Let it be received and marked as Plaintiffs' Exhibit No. 14.

The Clerk: So marked.

(The document referred to was marked Plaintiffs' Exhibit 14, and was received in evidence.)

Mr. Rowe: There are two other listings on the same exhibit that I want to call the court's attention to, your Honor, and offer. They are the listing of American Auto Association, abbreviated, "A-s-s-n," Agency abbreviated, "A-g-c-y"; and "American Auto Ins Co," the plaintiff company; "American Auto Wrecking Co."

The Court: Swear the witness.

SEWELL BROWN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [242]

The Witness: Sewell Brown.

Direct Examination

By Mr. Rowe:

Q. What is your residence?

A. 1304 East Mendocino Drive, Altadena, California.

(Testimony of Sewell Brown.)

Q. What is your business or occupation?

A. I am an insurance agent and broker.

Q. For how long have you been such?

A. Over 25 years.

Q. Approximately how many companies do you act as agent for? A. About four.

Q. Otherwise you as a broker place insurance in how many companies?

A. Innumerable. It is hard to say just how many. Maybe fifteen.

Q. Have you been in business in Los Angeles over this period of time that you have just indicated?

A. Most of the time. Part of the time in San Diego.

Q. But the most part in Los Angeles?

A. That's right.

Q. In Southern California the whole time?

A. That is right.

Q. Over these years will you state whether or not [243] you have developed a clientele?

A. Yes, sir.

Q. When someone who is a client of yours wishes to place insurance, will you state how that matter is handled as between you and your client?

Mr. Stanbury: That is objected to as immaterial, your Honor, and incompetent how this gentleman transacts his business.

The Court: The objection is overruled.

(Testimony of Sewell Brown.)

Mr. Rowe: You may answer the question, Mr. Brown.

The Court: That is, it is your purpose to show that that is the general practice in this vicinity?

Mr. Rowe: That is correct.

The Court: Do you know what the practice is generally in this vicinity, Mr. Brown, of placing the type of insurance—You have been sitting in the court room for some time?

The Witness: Yes.

The Court: That is, we are not considering life insurance. Are you familiar with the general practice in this community of placing that insurance?

The Witness: Yes, sir.

Q. (By Mr. Rowe): Will you state what it is?

A. The client informs me the type and kind of insurance he desires, and according to the line that he desires [244] I make my recommendations as to where I should place it for him.

The Court: Does he advise you in advance in what company he desires it placed, as a rule?

The Witness: Not as a rule, no, sir.

Q. (By Mr. Rowe): In what percentage of the cases that you handle or the placing that you make would you say you had a request from your client for any particular company?

A. We have occasional requests where a client will express and name a company. In most cases that is where they desire to have their policy renewed with the previous carrier. We have had that

(Testimony of Sewell Brown.)

type quite frequently, and those are the cases, generally where I have to exercise that business under my broker's license, if I am not appointed as an agent. It is infrequent. It is not too frequent.

Q. In what percentage of the policies that you place would you say you have a request from a client for any particular company?

A. About one-tenth of one per cent.

Q. About one-tenth of one per cent?

A. Something like that. It is hard to estimate it. It is impossible.

Q. Mr. Brown, among insurance people have you ever heard reference made to auto clubs?

A. Yes, quite a number of times. [245]

Q. Will you state how the people with whom you have talked in the insurance world with regard to auto clubs refer to such clubs? I mean by the full name of the club or by an abbreviation?

Mr. Stanbury: I am objecting to it, your Honor, on the ground that it is immaterial how people refer to clubs. It doesn't bear on any issue in this case that I know of.

Mr. Rowe: We are a club. We have heard a lot about how the plaintiff companies have been referred to. Since our club is in operation I think we are entitled to ask how clubs are generally referred to.

Mr. Stanbury: I have no question that if everyone knew they were dealing with a club the chance of confusion would be very much reduced.

(Testimony of Sewell Brown.)

The Court: The objection is overruled.

A. If a client comes in, if he is a member of a club, wanting to know their custom as to certain rates or discount by reason of being a club member, I ask them the name of the club, there are quite a few clubs around, in this area there is the Automobile Club of Southern California, the Randall Automobile Club, occasionally we will have the Orange County Automobile Club, I think is the name of it, and sometimes we have San Francisco people that are a member of the Northern Club up there, I forget the name of it at the moment. [246]

Q. (By Mr. Rowe): When reference is made to those types of organization by you or by such people, is the word "club" expressed or used?

A. Yes, they always say "club." National Automobile Club. It is not confusing at all to me, if that is what you mean.

Mr. Stanbury: I move that be stricken as a conclusion of the witness.

The Court: It may go out.

Q. (By Mr. Rowe): As an insurance man and one who has been in business in this area for some twenty-five years, I would like to ask whether there would be any confusion in your mind between American Automobile Insurance Company, or American Automobile Fire Insurance Company, or American Auto, and the word or title American Auto Club.

Mr. Stanbury: That is objected to as immaterial, incompetent and not the proper test.

(Testimony of Sewell Brown.)

The Court: Read the objection, please.

(The objection was read by the reporter.)

The Court: Isn't that substantially the same question that was asked by Mr. Stanbury that you objected to, Mr. Rowe?

Mr. Rowe: I don't recall having objected to such question. I may have. If I have, I have forgotten that I did. [247]

The Court: I think you objected to it, and the court made the remark—read that question.

(The question was read.)

The Court: Aren't you asking him a question that the court has to determine?

Mr. Rowe: I think in the final analysis that is correct.

The Court: You are asking him as an expert?

Mr. Rowe: Yes.

The Court: There are cases in California, *Sim v. Weeks*, 7 Cal. App. (2d), *Pacheco v. Judson*, in 113 Cal. a number of cases, which are directly in point that that is a matter which an expert shouldn't answer. It is the ultimate question to be determined by the court.

Mr. Rowe: If your Honor please, I think in the case of *Jackman v. Mau*—

The Court: That is one of the cases.

Mr. Rowe (Continuing): —a similar question was asked and was answered without any disapproval of it by the upper court. I think they called

(Testimony of Sewell Brown.)

a man who was a manager of Hastings, or some other store, who had seen this sign and asked him if he was confused by it. I can't say that was the exact language, but that was the import of the question, and I think he answered that it was.

The Court: Was there an objection? [248]

Mr. Rowe: That I don't remember particularly. I won't press it, your Honor.

The Court: But it borders on that.

Mr. Rowe: You may cross-examine.

Cross-Examination

By Mr. Stanbury:

Q. Mr. Brown, there are people, no matter how rare they may seem in your experience, who ask for insurance in a particular company, are there not? A. That is right.

Q: Some of those people may have been insured in it somewhere else previously, of course?

A. That's right.

Q. They may know some one who is insured with them and have been satisfied with them?

A. Yes. sir.

Q. In other words, there are many, a variety of situations or inducements which may cause the rare person to seek insurance in a particular company?

A. That's right.

Q. I will put you a hypothetical case. If somebody wishing insurance in a certain company were to telephone what they believe to be that company through, let us say, an error in name in their mind,

(Testimony of Sewell Brown.)

or an error in their looking in the telephone directory, and spoke to the wrong party [249] unawares, there is nothing in the insurance set-up, for example, say that you were the person called, which would prevent your writing insurance for them, would there be?

Mr. Rowe: May I hear the question, your Honor?

The Court: Read the question.

(The question was read by the reporter.)

Mr. Rowe: I object to the question on the ground it is compound and complex, and as far as I am concerned it is unintelligible.

Mr. Stanbury: It may be unintelligible, and I think it is unintelligible when I hear it read back.

Q. (By Mr. Stanbury): Mr. Brown, you refer to the way people talk about clubs, people often say, "I am insured with the Auto Club," for example, do they not? A. That's right.

Q. As a matter of fact, they don't actually have insurance with the Auto Club, do they?

A. In some cases.

Q. Well, the Auto Club, for example, writes no liability insurance at all?

A. That's right, but they write the material damage.

Q. But they write collision?

A. Yes, comprehensive fire and theft.

Q. But as far as their liability insurance is concerned, it is written, I believe, with the Standard

(Testimony of Sewell Brown.)

Accident [250] Company? A. That's right.

Q. But people have that habit of saying "I am insured with the Auto Club," do they not?

A. That's right.

Q. Do you know—and please give me yes or no—do you have positive information of your own knowledge, positive information, whether the National Automobile Club even takes applications for insurance or has anything whatever to do with the brokering or acting as agent for any company?

A. To my knowledge they do not.

Q. That's right. That is, you know that to be a fact, that unlike the Automobile Club of Southern California, the National Automobile Club has hands-off insurance altogether, do they not?

A. That's right.

The Court: This is beside the point, but what is the function of the National Automobile Club?

Mr. Stanbury: It is purely and simply a club with nothing whatever to do with insurance. This gentleman has testified accurately on that.

Mr. Rowe: Just let me check.

The Court: Does it render any service to its members?

Mr. Stanbury: Yes. I am a member and can speak for [251] what service they do render.

The Court: But it has nothing to do with insurance?

Mr. Stanbury: Nothing whatsoever.

Mr. Rowe: Are you saying now as a member of

(Testimony of Sewell Brown.)

the National Automobile Club if you came to the Club after an accident, for example, that you would get no assistance whatsoever from the Club regarding any insurance?

Mr. Stanbury: None whatsoever. They would tell you to go elsewhere. They will tow you—they will pay your towage fees, they will give you maps, they will do other things that clubs do——

The Court: That is just in line with what Mr. Brown has said, that they don't handle any insurance.

Is that correct?

The Witness: They are not writers.

Mr. Stanbury: Thank you, Mr. Brown. No further questions.

* * *

Mr. Rowe: May I, in view of the testimony, your Honor, [252] just read this into the record?

The Court: Do you want to show that your own witness' testimony is incorrect?

Mr. Rowe: I don't know. I want to show as far as the National Automobile Club is concerned in its folder it says: Insurance Claims—The Legal Department assists the member in collection for damages to his car caused by automobiles.

That would be in reply to Mr. Stanbury.

The Court: That isn't material.

Mr. Stanbury: That is another matter, if your Honor please. That is helping an insured surrogate.

Mr. Rowe: Then it says: substantial reduction on members' collision premiums is granted by the strongest and most reliable companies in the business.

Mr. Stanbury: I would like to call back Mr. Brown and have him explain that.

The Court: I don't think that is material. I just asked for a matter of information, in view of what Mr. Brown said. Some reference was made to the National Automobile Club. I think we would go far afield if we would attempt to go into these matters now.

Mr. Stanbury: All right, your Honor. [253]

GILBERT R. SCHWARZ

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. What is your residence?

A. 7512 Flight Avenue, Los Angeles 45.

Q. What is your business or occupation, Mr. Schwarz?

A. I am manager of the local office of Western States Insurance Brokers.

Q. Does that organization have any agency contracts, or is it entirely a brokerage business?

A. Strictly brokerage business.

Q. Are you yourself a licensed agent or broker?

(Testimony of Gilbert R. Schwarz.)

A. I am a licensed solicitor.

Q. Do you have requests from persons from time to time who are clients of that company for placing insurance, do you have customers or clients who call you to have insurance placed?

A. Very frequently, yes.

Q. Do those calls come to you?

A. They come to me personally.

Q. In what percentage of cases, if any, would you say [254] the customer or your clients indicate the company in which the insurance is to be placed?

A. I can definitely say that it has happened to me once since August 1st, the date that I took over the management of the office.

Q. Once since August 1st. Can you give us any idea how many policies of insurance you have placed since that time?

A. Strictly automobile, I presume?

Q. Yes, that is all we are concerned with.

A. I would say probably 75 to 100.

Q. Have you ever heard of American Associated Insurance Companies? A. I have.

Q. You have been in business how long? About four years?

A. A little less than four years.

Q. Have you heard of American Automobile Insurance Company? A. I have heard of it.

Q. Have you heard it referred to as American Auto? A. I have.

Q. Have you also heard of it referred to as American Associated Insurance Companies?

(Testimony of Gilbert R. Schwarz.)

A. I have heard it referred to as American Associated [255] Group.

Q. That is, within the period of time that you have been in the business, about four years?

A. That's right.

Mr. Rowe: You may cross-examine.

Cross-Examination

By Mr. Stanbury:

Q. Mr. Schwarz, you have heard of the American Automobile Insurance Company referred to as American Auto, have you not, sir?

A. I have.

Q. Is there any other organization that you know of in this state that you have ever heard referred to as American Auto besides these plaintiff companies? A. No.

Q. You have also heard of the American Associated, have you not? A. I have.

Q. You have heard of them referred to, as you say, as American Associated Group?

A. That's right.

Q. As an insurance man you understand, I take it, that the American Automobile Insurance Company is an entity belonging to a group of affiliated companies, do you not? [256] A. I do.

Q. You as an insurance man have heard of the Commercial Indemnity Company, have you not?

A. I have.

Q. But you also know of it as a member of the Loyalty Group? A. That is right.

(Testimony of Gilbert R. Schwarz.)

Q. You have heard of the London-Liverpool Group, have you not?

A. London-Liverpool and Globe.

Q. But you also know of the Globe Indemnity Company as a separate entity? A. Yes, I do.

Q. Whenever anyone says "Globe" to you you think of Globe Indemnity? A. Yes.

Q. When anyone says "Royal" to you you think of Royal Indemnity?

A. Royal Indemnity, Royal Insurance.

Q. When they say "American Auto" you think of "American Automobile Insurance Company," that is right, isn't it? A. I would say yes.

Q. And when you hear "American Associated," you think of the Group? A. That's right.

Q. And you have been manager of your present company [257] since last August 1st?

A. August 1st.

Q. You have been in Los Angeles how long?

A. Since that date.

Q. And the contact you have had with this phase American Auto, and others, has all been, then, in the last five or six months? A. No.

Q. Have you heard about it before you came here?

A. I heard of it in San Francisco.

Q. You heard of them both before and after coming to Los Angeles? A. That's right.

Q. With reference to your particular telephone calls, what percentage of the calls you get from

(Testimony of Gilbert R. Schwarz.)

assureds or prospective assureds is in connection with the acquisition of insurance? All of it in your department, or what?

A. Any telephone call I get is regarding insurance matters.

Q. Might it be in regard to claims?

A. It definitely may be.

Q. So this group of people of whom you say—I believe you said only one has asked for a particular company—you are including everyone who has called up about a claim, is that right? [258]

A. When I answered that question we were referring to placing business.

Q. All right. You have had calls from people who wanted insurance? A. That's right.

Q. But a great majority of those are people that want renewals, are they not?

A. Not necessarily.

Q. Don't you get calls from most of the people who do want renewals?

A. I generally write a renewal solicitation letter to people regarding renewals.

Q. Then you usually get a phone call or letter in reply? A. Postcard, self-addressed.

Q. Then the people you talk to aren't all new applicants looking for insurance to start out with?

A. Not all of them.

Q. Not a very big percentage, would you say, are?

A. I answered the question that about 75 to 100

(Testimony of Gilbert R. Schwarz.)

new policies were written since August 1st in my office.

Q. I didn't understand that. That is the total of new policies?

A. Since about October—since August 1st, since I have been in the office. [259]

Q. Of those there is only one that you recall who did ask for a particular company?

A. That's right.

Q. You know from your experience in insurance business elsewhere that there are people, however, few they may be, who have for some reason peculiar to themselves a preference for a certain company?

A. That's right.

Mr. Stanbury: That is all. I have no further questions.

The Court: That is all.

WALTER MULLER

called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Rowe:

Q. Mr. Muller, will you state your occupation? You may have stated it.

A. I am a service station operator.

Q. And you operate in Hollywood?

A. In Hollywood under the concern name of Muller Brothers.

(Testimony of Walter Muller.)

Q. And that is a partnership between you and your brother? A. Yes. [260]

Q. You also have an automobile agency at that place? A. Yes.

Q. Oldsmobile agency? A. Yes.

The Court: And he is an insurance agent, that is, his company.

Q. (By Mr. Rowe): You have been in the service end of the business for a great number of years, have you not? A. Yes, sir.

Q. In any period of that time have you been connected with any automobile club insofar as servicing cars of its members is concerned?

A. Yes, sir.

Q. With what club?

A. The Automobile Club of Southern California.

Q. And how long were you connected with that organization? A. About 15 years.

Q. And what was your service?

A. Our service was—we were an official garage for the Automobile Club of Southern California, took care of any emergency calls, rendered 24-hour service, tire service, battery service, wreck service, tow service, any emergency calls where a motorist was out on the road in trouble.

Q. In connection with that service did you have any [261] equipment which was particularly adapted for that purpose? A. Yes, sir.

Q. What would that be?

A. We were connected with the Auto Club for a

(Testimony of Walter Muller.)

period of about 15 years, and during that period we built up several hundred thousand dollars worth of equipment in the matter of tow trucks, pick-ups, battery service trucks, tire service trucks, tow trucks, and so forth. In fact, we had six pieces of equipment.

Q. Do you still have that connection with the Automobile Club of Southern California?

A. No, sir.

Q. When was it terminated?

A. It was terminated in 1947.

Q. Was that about the time you gave consideration to the formation of an auto club on your own initiative?

A. Yes, sir.

Q. And thereafter did you cause the Auto Club of Hollywood to be incorporated.

A. Yes, sir.

Mr. Rowe: I would like at this time, your Honor, to introduce in evidence a copy of the Articles of Incorporation of the Auto Club of Hollywood. Mr. Stanbury has seen it and he is satisfied with the plain copy and lack of [262] certification.

The Court: Let it be received in evidence and marked as Defendant's Exhibit M.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

Q. (By Mr. Rowe): After the Auto Club of Hollywood was incorporated the proceedings took

(Testimony of Walter Muller.)

place to which Mr. Thomas testified here earlier with regard to the name? A. Yes, sir.

Q. And as a result of those proceedings the name was changed to American Auto Club, is that correct? A. Yes, sir.

Mr. Rowe: I would like to introduce as part of the same exhibit the certificate of amendment of American Auto Club.

The Court: It may be attached to the same exhibit.

Q. (By Mr. Rowe): How did you happen to choose the name American Auto Club, Mr. Muller, will you state to the court?

Mr. Stanbury: It is objected to as immaterial, your Honor.

The Court: It is overruled.

A. Well, as I stated before, after the World War I we established this service station business in Hollywood, my brother and I, and have been operating over a period of [263] about twenty-eight years now. During that time we established this business, built it up into quite a large institution, in fact, up to now we have 175 employees, and we have an investment of over a million dollars in our establishment. Some 15 years ago we made the connection with the Automobile Club——

Mr. Stanbury: Pardon the interruption, sir. I move to strike the whole answer, your Honor. The question was how did you happen to choose the name "American Auto Club."

(Testimony of Walter Muller.)

The Court: Yes. Did you have in mind that was the question?

The Witness: Yes.

The Court: Go ahead with your answer. Wait until the answer is finished.

A. (Continuing): We built up a large business. About 15 years ago we made the connection with the Automobile Club of Southern California to be their official garage in the Hollywood district, which was a small territory at first, and then it was enlarged during the war, and we maintained 24-hour service and built up our service equipment to the extent that it was quite an asset to our business in the matter of making contacts with customers and getting repair jobs and so forth. Through a political maneuver, over which we had no control, we lost this connection. We had several thousand dollars' worth of equipment on hand, [264] and it gave us the thought of establishing an auto club of our own to maintain this contact with customers. At that time we proposed to call it the Auto Club of Hollywood. After that was objected to by the Automobile Club of Southern California, we asked for some other names to be submitted. For quite some time we gave it quite a consideration, as to the name. Among the names submitted was the name American Auto Club.

The Court: Who submitted the name.

The Witness: I think it was our attorneys. They submitted a group of names——

(Testimony of Walter Muller.)

The Court: You should know who submitted it. You and your brother are in charge of this business?

The Witness: Yes, sir.

The Court: You say names were submitted.

Mr. Rowe: He means to the Insurance Commissioner, your Honor.

Mr. Stanbury: Does he?

The Court: I got the impression that the names were submitted to you, and you gave them consideration.

The Witness: Yes. I think it was submitted by Mr. Potruch, our lawyer.

The Court: He suggested certain names?

The Witness: Certain names, yes.

The Court: And you selected one of [265] them?

The Witness: Yes.

Mr. Stanbury: Before we continue, the lengthy answer of the witness, which contained the history of Muller Brothers in concise form, I move to strike the whole of said answer down to the place where he said, "We selected the Auto Club of Hollywood," on the ground it is not responsive to the question.

The Court: Yes, I think it is not responsive.

Mr. Rowe asked you after you determined it was necessary to amend your articles and change the name, why did you select the name which you now have?

The Witness: Because we felt that it would ap-

(Testimony of Walter Muller.)

peal to a larger group of a clientele than the original name, Auto Club of Hollywood. We were told that we had quite an idea and it was a good idea to establish an auto club.

The Court: Who told you that?

The Witness: Our friends, friends we talked with, and our business associates.

The Court: In any event, then you decided on the name——

The Witness: American Auto Club. It appealed to us, the name appealed to us as being very popular, and our advertising man——

The Court: But Mr. Potruch submitted to you certain names, among these names he submitted for your consideration was the American Auto Club? [266]

The Witness: Yes, sir.

The Court: You decided that would best serve your interests, is that correct?

The Witness: We consulted, also, our advertising agency, and——

The Court: That is employed by you, isn't it?

The Witness: That's right.

The Court: Whatever it was, you decided it was for your best interest, whether for advertising or what?

The Witness: Yes.

The Court: Go ahead.

Q. (By Mr. Rowe): Did that name "American" have any particular appeal to your fancy in any particular way? A. Yes, it did.

(Testimony of Walter Muller.)

Q. In what way?

A. It just seemed that it had a universal appeal. In fact, the definite deciding thing—I was driving down the street and I saw a big van, American Van & Storage, and it looked nice. And also when I was in Europe in 1927 the American Express was the center of gravity for all Americans. The word “American” appealed to me. It just stood out as being a name that would have universal appeal for an auto club, and it didn’t conflict with any of the other auto clubs, and for that reason I submitted it to my advertising agency, and he said, “That is the name that rings the bell.”

Q. Since this club has been organized, Mr. Muller, approximately how much would you say you have expended in its development?

Mr. Stanbury: That is objected to——

Q. (By Mr. Rowe): That is, the club has spent.

Mr. Stanbury: Objected to as immaterial, unless it is limited to what he spent on this name, your Honor.

The Court: Read Mr. Stanbury’s statement.

Mr. Stanbury: Then, I object to it unqualifiedly.

(The record was read by the reporter.)

The Court: In other words, you are making a general objection to it, also?

Mr. Stanbury: Yes, that it is immaterial.

The Court: What is the purpose of it?

Mr. Rowe: The purpose is to show the status

(Testimony of Walter Muller.)

of the organization. If we were in business and had been in business for a time, and we were trying the same issue, we certainly, I think, would be entitled to show the status of our business and how it was being operated. Since we are not actually in business, I think we are entitled to show the amounts that have been expended towards the development of the club up to this point, and, likewise, to show how the people who are going to run this club intend to operate.

The Court: What is this last part—how you intend to [268] operate?

Mr. Rowe: I haven't gotten to that yet.

Mr. Stanbury: Your Honor, I concede if the defendant were in business under this name, that he certainly could show that, he could show that he had been in business for six months or nine years, as in the Standard case, for example. But he hasn't gone into business. The most that I see that could be material is what has he put into this name; not into a club that first he had under a different name. I submit that is immaterial, because he is not in business. And if before he emerges from a chrysalis state he spends a lot of money that couldn't be chargeable to any laches on the part of the plaintiffs, I submit that is immaterial. But I respectfully submit if any part of it is material, it is only that that is tied up with this name and not with the whole idea of a club.

(Testimony of Walter Muller.)

The Court: That may be. I think that should be the limitation.

Q. (By Mr. Rowe): Subject to that limitation, how much, Mr. Muller, expense have you incurred in connection with the acquiring of the name "American Auto Club"? A. About \$7,000.

Q. Who are the stockholders of the American Auto Club? A. My brother and [269] myself.

Q. How much stock has been purchased by both of you? A. \$10,000 worth.

Q. That is the investment of the club?

A. Yes, sir.

The Court: This expense goes just to the use of the name American Auto Club, not to the expense of organization?

Mr. Rowe: That is correct.

The Court: You didn't include that, did you? Did you include all expenses?

The Witness: I included all the expenses.

The Court: He didn't understand.

Q. (By Mr. Rowe): Can you limit that to the expense of the name, Mr. Muller?

A. No, sir.

Q. You have had printed a form of application for membership and service contract in the American Auto Club, and it is marked here Plaintiffs' Exhibit 2, and on the reverse side of this are certain statements with regard to towing service, emergency road service, bail bond service, discount service, financial service, buying and selling service

(Testimony of Walter Muller.)

theft service, map service, touring service, license service, insurance service, hunting, fishing and camping service, protective emblems; does that page contain an accurate statement of the various services which American Auto Club proposes to render to those who may become its [270] members?

A. Yes, sir.

Q. Does that page contain a complete statement of the services which the American Auto Club proposes to render to its members? A. Yes, sir.

Q. Does the American Auto Club expect to act either as an insurance agent or broker for any type of insurance? A. No, sir.

Q. Does the American Auto Club expect at any time to act as a writer of insurance, that is, as the plaintiff companies do? A. No.

Q. The emblem which has already been introduced in evidence, I believe you testified to previously, is the one that has been selected by those who are in charge of the club? A. Yes, sir.

Q. The reason the club has not gone forward to commence its activities beyond what has actually happened is due to the fact that with the filing of this suit the club suspended its operations until the suit was determined, is that correct?

A. Yes, sir.

Mr. Rowe: You may cross-examine. [271]

(Testimony of Walter Muller.)

Cross-Examination

By Mr. Stanbury:

Q. Mr. Muller, yesterday I read to you that passage of your deposition in which you stated:

“We had in mind approaching Mr. Sessions if he had a good enough discount for us to operate”; and the question:

“When I say ‘you’ I mean the American Auto Club also”;

“A. That is me, the same thing.”

You recall that?

A. Yes, sir.

Q. You already as Muller Brothers had arrangements with companies, did you not?

A. Yes, sir.

Q. You were agent for what company?

A. GMIC and the Harbor and Republic.

Q. They write a general line of automobile insurance, do they not? A. Yes, sir.

Q. Liability and material damage?

A. Yes, sir.

Q. And when you said that you meant to approach Mr. Sessions if he had a good enough discount for us to operate, [272] you meant something in addition for the American Auto Club?

A. In addition for Muller Brothers.

Mr. Stanbury: May I, if the court please, see the original file?

(File handed to counsel.)

(Testimony of Walter Muller.)

Q. (By Mr. Stanbury): I call your attention to the answer that you filed to the original complaint in this case, dated or filed on April 20th of last year, '48; do you recognize that answer?

A. Yes, sir.

Q. On page 3, paragraph X, is the following:

“Answering paragraph IX, this defendant admits that it proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile insurance policies”;

I correctly read from it, did I not?

A. Yes, sir.

Q. And you swore to that, did you not, on April 19, 1948? A. Yes, sir.

Q. You read it before you swore to it, did you not?

A. I don't remember whether I read it or not. I have a lot of those to sign, and I very seldom read those answers. They are prepared by the attorneys, and I am told to sign [273] them, and I very seldom read them.

Q. You don't mean that you are sued so many times that you sign so many answers you are too busy to read them?

A. No; but we sue a lot of other people.

Q. Do you know whether you read that answer before you swore to it, or not?

A. I don't recollect. I imagine I did, but I never gave it a lot of thought as to the wording of it.

(Testimony of Walter Muller.)

Q. That is your signature, isn't it?

A. Yes, sir.

Q. You did swear to it before a notary public, did you not, sir? A. Yes, sir.

Q. And I assume that before the answer was filed you conferred with your attorneys about this law suit, did you not? A. Yes, sir.

Q. And when you gave your testimony on October 8th of last year that I just read, in part, and in whole yesterday on this subject, page 8, were you at that time trying to tell the truth about your intentions with regard to insurance? [274]

A. Yes, sir.

Q. And now your testimony is that what you intend to do regarding insurance is what is shown under Insurance Service on the back of this Exhibit No. 2, is it not? A. Yes, sir.

Q. You don't wish to modify that any further, do you, Mr. Muller? A. No, sir.

Q. All right. Now, the \$7,000 you paid, that includes, I assume, money spent for attorneys' fees, and so on, protecting the name Auto Club of Hollywood, or attempting to protect it, does it not?

A. Not necessarily.

Q. At least you don't contend that the \$7,000 was spent in amending—

The Court: He stated no, that it was all the expenses.

Q. (By Mr. Stanbury): With reference to your reason for wanting the name American, you and I

(Testimony of Walter Muller.)

left the office of your attorney after your deposition in the same elevator, did we not, with the court reporter? A. Yes, sir.

Q. And there was just some casual talk back and forth between us, was there not?

A. I don't remember at the time.

Q. Do you remember telling me at that time that you [275] wanted the word "American," wanted the name "American" so you would be listed first in the telephone directory under clubs?

A. That's right, sir.

Q. That was your reason then?

A. That was one of the reasons.

Q. The equipment you have for operating this club, you can use that under any other name that you wanted to do business under, could you not, your equipment? A. Yes, sir.

Q. Would your desire for the word "American" be satisfied with the name "American Motor Club"?

A. No, sir.

Q. That is to say, the word "Motor" would kill your fondness for the word "American," is that what you mean? A. Yes, sir.

Mr. Stanbury: I have no further questions.

Mr. Rowe: If it please the court, I find myself in this position: I thought I had satisfactorily explained the allegations of the original answer to Mr. Stanbury at the time we took Mr. Muller's deposition. Apparently he is not completely satisfied with the explanation which I have given. In

(Testimony of Walter Muller.)

view of that fact, although I know it is not ordinary procedure, I would like to be permitted to testify, but I don't want to be disqualified from further participating [276] in the case.

Mr. Stanbury: I will waive that.

Mr. Rowe: You will waive the disqualification?

Mr. Stanbury: Yes.

Mr. Rowe: Step down, Mr. Muller.

EDGAR H. ROWE

called as a witness by and on behalf of the defendant, having been first duly sworn, testified as follows:

The witness: My name is Edgar H. Rowe. I am an attorney at law duly licensed and qualified to practice in all the courts of the State of California. Shortly after——

Mr. Stanbury: Pardon me. Would you mind, Mr. Rowe, proceeding by question and answer of yourself?

The Witness: That would be fun.

Mr. Potruch: Do you want me to ask the questions?

The Witness: I think I can ask myself the questions.

The Court: You do not need to ask yourself questions. You make a statement, and if there is any part you desire to strike out, Mr. Stanbury, then you may move to strike it out, unless you want Mr. Potruch to examine you.

(Testimony of Edgar H. Rowe.)

The Witness: I would prefer to make the statement.

The Court: Make a concise statement in explanation of what you have.

The Witness: Shortly after the complaint was filed in this action it was mailed to our San Francisco office where [277] I am located.

The Court: What is your office?

The Witness: Bronson, Bronson & McKinnon, 1500 Mills Tower, San Francisco, California. When the complaint came in to our office it was assigned to me for attention. I prepared the answer without ever having consulted with Mr. Muller prior to its preparation. I prepared the answer in extreme haste by reason of the fact that I had made an application for an extension, and I had been allowed an extension of time conditioned only on an answer. Being pressed by other matters, the answer went until quite late; it was done hastily. I prepared the allegation. It is my sole responsibility that that particular allegation appears in the answer, and I repeat it was done without prior conference with Mr. Muller as to the allegations of the complaint, by reason of the fact that I was in San Francisco and he was here. What conferences he may have had with Mr. Potruch, I don't know.

I might add to the statement that when we took depositions by stipulation in this matter, at the deposition I called Mr. Stanbury's attention to the fact that the allegation in the answer was erroneous and that I was going to amend it.

(Testimony of Edgar H. Rowe.)

The Court: Did you ask to have it amended?

Mr. Rowe: It has been amended. [28]

Mr. Stanbury: That's right.

Mr. Rowe: At that time Mr. Stanbury said he will waive an amended complaint, and we agreed, as lawyers do, to waive the formalities, and I prepared an amended answer, and the case is going to trial on the amended answer, and I assumed at that time the explanation I made to Mr. Stanbury was satisfactory to him.

Mr. Stanbury: I can state to the court it is perfectly satisfactory, as far as counsel was concerned, but I did not intend to overlook it as an admission by the client, of course.

The Court: We have all the matters now before the court. Are there any further questions?

Mr. Stanbury: Yes. If I may look at my file for just a moment, if your Honor please.

Cross-Examination

By Mr. Stanbury:

Q. Did you prepare the Articles of Incorporation? A. I did not.

Q. Your office did, did it not?

A. This office here. I can shorten your examination, I think, by saying this: My only acquaintance with this case is that I came down and attended and took charge of the hearing before the Insurance Commissioner with regard to the other name, did some briefing on that, and with this case [279] here.

Q. In your answer—I am attempting to find my

(Testimony of Edgar H. Rowe.)

copy. Do you want to see your answer, Mr. Rowe, as I call your attention to it?

The Court: That is the amended answer?

Mr. Stanbury: No. The original answer with this admission in it.

A. I think I am familiar with it.

Q. All right. In the answer, and outside of your special affirmative defense, the only affirmative admission which you made was that which was read to Mr. Muller a moment ago about the intention to sell insurance?

A. I haven't checked it, but I think that is correct.

Q. When you made that express admission——

A. I admitted that you sent us a letter.

The Court: He hasn't finished the question.

Q. (By Mr. Stanbury): When you made that express admission which I read to Mr. Muller, did you have any information at all to go by?

A. None except that I was a little puzzled by the allegations of your complaint, and I think if you will look at it it is not clear from the allegations of your complaint whether you allege that we will sell and issue as an insurer, or whether we will perhaps sell as a broker or agent. That is as I recall it. [280]

Q. When you gave this answer: "This defendant admits that it proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile

(Testimony of Edgar H. Rowe.)

insurance policies"—that was not dictated by any confusion arising from the complaint, was it?

A. I thought it was correct.

Q. That is the reason that you dictated it that way was because you found the allegation confusing for any other kind of denial, is that right?

A. I don't know. I wasn't clear in my own mind. I have that faint recollection of not being clear in my own mind as to whether you were charging us with selling and issuing as brokers, or selling and issuing as insurers.

Q. So, therefore, you made an express allegation as I just read? A. That is correct.

Q. Did you have any information to go by when you made that allegation, that admission?

A. I would say that I had no positive information; that I thought I was answering the complaint properly.

Q. This complaint, how long did you have to answer it? A month, or what was it?

A. We had one extension of time. I can't remember how long it was?

Q. About a month, was it not?

A. I am not quite sure.

Q. Did you during the period of time that you had attempt to ascertain in the facts. You did, did you not?

The Court: Mr. Stanbury, I think you are really extending the cross-examination upon this particular point.

(Testimony of Edgar H. Rowe.)

Mr. Stanbury: Belabornig the point?

The Court: Yes. We know that unfortunately sometimes attorneys take the matter in their own hands when they feel that they are rushed. There is no use of any dissertation on the part of the court. Attorneys are constantly getting extensions of time, as much as they can, from each other. They are courteous. But in this case it was a desire on the part of everybody to bring it on, and sometimes they overreach themselves and put in more there than they are justified in doing by reason of any statment of their clients. It is unfortunate, but it happens occasionally.

Mr. Stanbury: I don't question the bona fides of counsel at all, your Honor, but I make the point that the defendant read it, and the defendant's testimony in his deposition is what it was. That is why I am unwilling to let it pass merely as a lawyer's error.

The Court: The court isn't going to make any remark about it now. It may at a later time when it comes to a decision in the case, if it deems it necessary. [282]

Mr. Stanbury: All right.

The Court: If you have any further cross-examination, you may proceed with it.

Mr. Stanbury: I have no further questions, your Honor.

Mr. Rowe: May it please the court, I think we are prepared to close our case with the introduc-

(Testimony of Edgar H. Rowe.)

tion of a fairly large number of copies of the Insurance Journal, which I intend to identify by date and page as the plaintiff did.

Mr. Stanbury: I will stipulate to them. Just read them off as fast as you want to and tear them out, or whatever you want to do.

Mr. Potruch: We just got some of them in, your Honor.

The Court: Wouldn't a few of them be representative, Mr. Rowe?

Mr. Rowe: I have eliminated some that seem to be repetitious. What I am trying to do is pick up the time from 1944 forward, that is what I am trying to do.

The Court: You may proceed.

Mr. Rowe: I have here copies of the Insurance Journal—I will have to take these in any order. I have here a copy of the Insurance Journal of November, 1945, and I am offering in evidence page 9, which contains an advertisement by American Associated Insurance Companies.

Mr. Stanbury: Do you want to tear them out, Mr. Rowe?

Mr. Rowe: They don't belong to me. I don't think we [283] can.

I would like to introduce page No. 11 from the Insurance Journal under date of October, 1947.

The Court: You would like to do what?

Mr. Rowe: Introduce page 11 from the Insurance Journal of October, 1947. These, I presume, may be the same exhibit.

(Testimony of Edgar H. Rowe.)

The Court: Very well. Proceed with your offer.

Mr. Rowe: Page No. 7 from the Insurance Journal of July, 1947; page No. 9 from the Insurance Journal of October, 1946; page No. 7 from the Insurance Journal of June, 1948; the front cover of the Insurance Journal of September, 1944.

The Court: They may be received as Defendant's Exhibit——

Mr. Rowe: I have two or three more, your Honor, and I will be finished with them. Page 7 of the Insurance Journal of April, '47; and page 5 of the Insurance Journal of August, '47; an article appearing on page 3 of the Insurance Journal of July, 1944, headed "American Associated Group Coordinates," and this article refers to the coordination of these particular companies. I have penciled the article. An article on page 10 of the Journal of October, 1944, headed "American Automobile adds to Directory," an article appearing on page 6 of the Insurance Journal of March, 1945, headed "American Associated Gp."—"group" I suppose that is—"Combines San Francisco Offices." Then I offer the inside of the [284] last part of the cover sheet on the October 25, 1948, issue of Underwriters' Report.

The Court: These may be received and marked as Defendant's Exhibit N.

The Clerk: So marked.

(Testimony of Edgar H. Rowe.)

(The documents referred to were marked Defendant's Exhibit N, and were received in evidence.)

The Court: Anything further, Mr. Rowe?

Mr. Rowe: Just one thing and I am through with that. I would like this to go into the exhibit. The December 23, 1948, issue of the National Underwriter, and I am referring to the inside of the front cover.

Mr. Stanbury: What is the date, please?

(The record was read.)

Mr. Rowe: Defendant rests. [285]

* * *

Mr. Rowe: May it please the court, when we concluded yesterday I neglected to introduce one exhibit. Mr. Stanbury and I stipulated, subject to your Honor's approval that Best's Insurance Guide With Key Ratings for 1948 may be introduced in evidence, and the exhibit is offered only for the names of the insurance companies which are listed on the left-hand side of each page as one holds the book in front of him.

Mr. Stanbury: No objection.

The Court: It may be received as part of Exhibit N?

Mr. Rowe: N, I think, deals with another subject, your Honor.

The Court: Defendant's Exhibit O in evidence.

(The document referred to was marked Defendant's Exhibit O, and was received in evidence.)

Mr. Stanbury: There is one other matter, also, your Honor.

The Court: Wait just a minute, please.

What page is this on? [290]

Mr. Rowe: On all pages. The companies here involved, I am not sure of the number of the page, but if you let me have the book I can point them out to you.

(The book was handed to counsel.)

Mr. Rowe: The companies here involved are listed at the bottom of page 35 and the top of page 36.

The Court: Are you just asking to introduce the part at the bottom of page 35 and the top of page 36?

Mr. Rowe: No, your Honor. I was asking to introduce the many names that are listed in the columns on the left-hand side of the pages to illustrate the number of insurance companies which have similar names.

The Court: You don't want any below "American," but just including the word "American"?

Mr. Rowe: I had thought to go further than that, but if your Honor feels it should be limited to that, I won't press it.

The Court: There seems to be no objection to it. It appears, just looking at it, that there are not

many more there than there were shown in the list of California insurance companies. There may be some more.

Mr. Rowe: I think there are quite a few more.

The Court: Now, Mr. Stanbury.

Mr. Stanbury: Yesterday we stipulated to the corporate identity of the plaintiffs, and that stipulation is to be [291] further clarified.

It is stipulated that each of the plaintiff companies is and at all material times was a corporation organized under the laws of the State of Missouri.

Mr. Rowe: So stipulated.

Mr. Stanbury: And the Answer admits that the defendant is a California corporation.

* * *

The Clerk: Exhibit 2 seems to be missing, your Honor.

Mr. Stanbury: We agreed to substitute a copy of it. No one knows what became of the original.

* * *

(Whereupon Mr. Stanbury presented the opening argument on behalf of the plaintiffs and Mr. Rowe presented the [292] argument on behalf of the defendant, which arguments were reported by the court reporter but not transcribed.) [293]

* * *

The Court: The court does not have time, nor the inclination under the circumstances, in view of

the fact that there has been such a comprehensive argument presented by the attorneys, to take any extended time in ruling upon this matter .

There has been a great deal of testimony here, and I believe it is all, or substantially all, fresh in the minds of those present. Of course, it is impossible to recall all of the testimony in a case which has taken several days for trial, and in which there has been a great deal of printed evidence received and considerable testimony relating to such evidence.

I think that the plaintiffs must fail for two reasons. The first is that there is no secondary meaning as claimed by the plaintiffs. If the plaintiffs' names had ever acquired any secondary meaning, even in remote degree, it has been largely dissipated by the conduct of the plaintiffs in [296] the last several years, say, the last four years or so since they have changed their type of advertising and have used the advertising which they now employ. There has been no newspaper advertising that the court can recall, or any advertising (except in a very slight sense) to what might be even a part of the public in the last four years.

That is my recollection of it. I may have overlooked something, but this is my recollection that there has been nothing substantial done along that line within approximately the last four years, and probably more. It may be a few months more than four years. Since that time apparently there has been an effort on the part of the plaintiffs to have their companies known as the Associated Group.

That has been the tenor of their advertising, instead of the other.

Their emblem has been changed, and the general type of advertising has been along that line. There has been a change in the type of contact through the telephone calls. That has been changed some four years or so; three years at least.

There still remains in the minds of some of the insurance agents, no doubt, the use of the words "American Auto," which were originally employed, and when it is referred to in the old way by some of the people who are in the business they still think of the plaintiff companies. [297] But I do not think that attaches to the public, or to any considerable portion of it. I think it is negligible, in fact.

Along the line that the court has just spoken of, I do not know whether you gentlemen are familiar with the case of *Selchow & Righter v. Western Printing & Lithographing Company*, 47 Fed. Suppl. 322. There the court stated:

"That buyers for retailers had for years associated the trade-mark 'Parcheesi' * * * with plaintiff did not establish that name had acquired such a 'secondary meaning' for the public generally or any considerable portion thereof as to entitle plaintiff to exclusive right to use of the name."

In that case reference is made to the case of *Steen-Electric Corp. v. Herzfeld*, 118 Fed. (2d) 122. The court in the *Steen-Electric Corporation* case on page 125 said:

"Assuming that plaintiff's testimony in this re-

spect furnishes some support for its contention that the trade-mark 'Steem-Electric' carried a secondary meaning, it must be remembered that its dealers and agents, exclusively engaged in purchasing and selling its product, would naturally associate with plaintiff the product sold under its trade-name. It does not follow that the public or any considerable [298] portion thereof would be thus impressed. * * *''

I did not have time to Shepardize all of the cases cited. They are great in number, and, as Mr. Rowe said, I think that the court can only be enlightened by reading the cases and finding out what other courts have decided, and then apply the law to our own particular facts. After such application my conclusion is that there has been no establishment of a secondary meaning as contemplated by the decisions.

I think that the plaintiffs' case also will have to fall because there will be no confusion as claimed by the plaintiffs. There certainly will be no confusion on the part of the persons who are largely dealing with the plaintiff companies; that is, the insurance agents and brokers. They would not be confused. As to the percentage of the public that would be affected directly, even if they would be at all confused, it would be a very negligible percentage, in the opinion of the court. It would be a slight percentage, at most.

It was surprising to the court, really that so many people who purchase policies of insurance know so little about it as they apparently do, from the testi-

mony here of those who are engaged in the business. One witness stated that in his view there would not be one-tenth of one per cent of his customers who would be concerned as to [299] the company with which he was placing his policy.

One man who had been engaged in business here in Los Angeles since last August stated that within that period he had written from 75 to 100 new contracts, and that his recollection was that only one person had made any inquiry as to the company with whom it would be placed.

I think this was his testimony in substance. The percentage was slight.

I think there could be no appreciable part of the public who would make inquiry regarding these matters when it comes to the purchase of their policies. Taking all of the testimony together I do not see how they could be confused by the use of defendant's proposed name.

Something was said by Mr. Stanbury in his argument as to the desire to take advantage of the name. It hardly seems to the court that it was justified, because this is not a situation where, after apparently long consideration, the name was selected. The defendant, in fact, selected another name, and then it was placed in the position where it had to select a name other than the first one determined upon.

Of course such intent might be manifest by a very short consideration of it, but taking it all together it just does not appear to the court that it would show the intent to trade upon the plaintiff's name or to profit in any way by [300] it.

I have taken longer now than I thought I would when I began. The plaintiffs' prayer is denied.

Mr. Stanbury: Your Honor has made his ruling, but to correct the impression you got, I never suggested or intimated that the defendant intended to trade on our name. I say the reason he won't take the name "Motor Club" is because he intends to trade on the Automobile Club's name. That was my point.

The Court: The Automobile Club of Southern California?

Mr. Stanbury: Yes. That was an aside.

The Court: We aren't concerned with that here.

Mr. Stanbury: I merely wanted to correct that impression. I never suggested that he was trying to trade on our name.

The Court: I am glad you did correct it. I didn't think you would be making the argument unless it referred to plaintiffs, because we are not concerned here with the Automobile Club of Southern California.

Mr. Stanbury: No, but he said he was in love with the name "American" and not with "American Motor," however.

The Court: It was, really, just to attack the credibility of the witness in that statement?

Mr. Stanbury: Yes.

Mr. Rowe: There will be an order for [301] the defendant to prepare findings and submit them to opposing counsel?

The Court: Yes. [302]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of April, A.D. 1949.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed February 1, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 37, inclusive, contain the original Amended Complaint for Injunctive Relief; Answer to Amended Complaint; Plaintiffs' Exceptions to Proposed Findings, etc.; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Cost Bond on Appeal and Designation of Contents of Record on Appeal and full, true and correct copy of Docket Entries which, together with

original reporter's transcript of proceedings on January 4, 5, 6 and 7, 1949, and original Plaintiffs' Exhibits Nos. 1 to 14, inclusive and original Defendant's Exhibits A to O, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.75 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21 day of February, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12484. United States Court of Appeals for the Ninth Circuit. American Automobile Insurance Company and American Automobile Fire Insurance Company, Appellants, vs. American Auto Club, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit

No. 12484

AMERICAN AUTOMOBILE INSURANCE
COMPANY, a Corporation, et al.,
Plaintiffs,

vs.

AMERICAN AUTO CLUB, a Corporation, et al.,
Defendants.

STATEMENT OF POINTS

Throughout the United States the words "American Auto," when used in connection with automobile insurance, refer alone to these appellants and have thus, for automobile insurance purposes, acquired a secondary meaning. Clearly, and as a matter of law, respondent's proposal to sell automobile insurance as "American Auto Club" and to equip its members' cars with emblems bearing the words "American Auto" will cause confusion and injury. The judgment to the contrary is opposed to the evidence and is unsupported.

PARKER, STANBURY,
REESE & MCGEE,

By /s/ RAYMOND G. STANBURY,
Attorneys for Appellants.

[Endorsed]: Filed April 24, 1950.